No. 87-514

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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JAMES L. HOOPER AND
DEER PARK MEDICAL GROUP, P.A.,

Petitioners,

v.

STEPHEN H. SACHS, DALE P. KELBERMAN,
AND ANDREW C. TARTAGLINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether to defeat a motion for summary judgment plaintiffs were required to produce direct evidence of the content of defendants' communications among themselves in circumstances in which the evidence adduced was subject to conflicting inferences, in which defendants' testimonies were inconsistent, conflicting, and self-contradictory, in which the only direct evidence of the content of the communications was solely within defendants' knowledge, and in which potentially incriminating documents under defendants' exclusive control were claimed to have been lost.*/

*/ The parties are referred to as in the district court. For additional parties in the district court who no longer are involved in this case, see, our Application for Enlargement of Time to File Petition for a Writ of Certiorari (footnote at 2), filed September 21, 1987.

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TO THE UNITED STATES COURT OF APPEALS
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TO: THE HONORABLE, THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

James L. Hooper and Deer Park Medical Group, P.A., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 86-1623.

OPINIONS BELOW

The unreported opinion of the court of appeals appears at page 1 of the Appendix, filed as a separate volume with this petition. Opinions of the district court appear at pages 8, 23, 32, 38, and 111 of the Appendix. The opinion of the district court which appears at page 38 of the Appendix is reported at 618 F. Supp. 963. All other district court opinions are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1987. No petition for rehearing was filed, and no orders were entered relating to a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and 2101(c). An extension of time to file this petition was sought on September 21, 1987, and was denied on September 24, 1987.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

The Fourth Amendment to the Constitution of the United States Provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to

be a statute of the District of Columbia.

Rule 56 (b) and (c) of the Federal Rules of Civil Procedure provides:

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT

1. Nature of the Case

This case is before the Court on a petition for a writ of certiorari filed by James L. Hooper, M.D., and Deer Park Medical Group, P.A. ("Deer Park"), to review the judgment of the United States Court of Appeals for the Fourth Circuit (A. 126),1/ affirming a summary judgment for defendants by the United States District Court for the District of Maryland2/ in this 42 U.S.C. 1983 damages action against Stephen H. Sachs (former Attorney General of Maryland), Dale P. Kelberman (an Assistant Attorney General of Maryland), and Andrew C. Tartaglino (former Chief Investigator for the Maryland

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1/ "A." references are to the separately bound Appendix to this Petition. "J.A." references are to pages of the Joint Appendix in the court of appeals, which we requested be certified to this Court pursuant to Rule 19.2. Since we understand the Court no longer wishes that done, we are lodging a copy with the Clerk.

2/ The court of appeals judgment incorrectly identifies the district court.

Medicaid Fraud Control Unit ("MFCU"), a part of the Office of the Office of the Attorney General). The action asserts defendants violated plaintiffs' Fourth Amendment rights by utilizing Dr. Cheryl Winchell, a private individual, to search and seize plaintiffs' records for the MFCU for use in a contemplated criminal investigation and subsequent abortive prosecution of Dr. Hooper.

2. The Facts and Evidence

On February 21, 1980, defendant Tartaglino was telephoned by Dr. Cheryl Winchell, a disgruntled former employee, and a shareholder of Deer Park who was involved in civil litigation with Dr. Hooper and Deer Park. Winchell claimed to have incriminating information about Dr. Hooper. Tartaglino made an appointment with Winchell. A. 47.

Winchell first met with Tartaglino in Baltimore on February 27, 1980. She brought with her some documents she had obtained from

Deer Park during prior discovery in her pending civil litigation (A. 47-49).3/ At that meeting, which was attended by Winchell, defendants Tartaglino and Kelberman, and, for at least part of the time, Anton Keating, then Chief Counsel to the MFCU (J.A. 502, 725, 732, 857-858), Winchell stated that she was engaged in litigation with Dr. Hooper and Deer Park and that she had a date the following month to go back to Deer Park to conduct further discovery. According to a contemporaneous memorandum written by Kelberman (J.A. 506-507) and his testimony in a 1982 deposition (J.A. 870), Winchell brought with her to that initial meeting 10 or 11 Medicaid vouchers and Deer Park patient charts relating to those patients. The claim

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3/ The civil litigation brought by Winchell included allegations that Deer Park had engaged in Medicaid Fraud. As part of that litigation Winchell had conducted discovery at Deer Park in late 1979. At the time of the contact she was seeking further discovery. Winchell was successful in her request prior to the time she met with the MFCU. A. 3-4.

was that Deer Park and Dr. Hooper had billed Medicaid for patient office visits that did not take place. Winchell claimed the charts and vouchers did not match and that therefore money was fraudulently obtained (A.4). It is undisputed defendants did nothing improper in accepting these initial documents from Winchell. They were obtained by Winchell prior to any contact with the MFCU.

Winchell returned to Deer Park twice after her meeting with the MFCU -- on March 10 and 12, 1980 -- to inspect and copy documents (A. 4-5). Some of the patient charts she copied, and in particular the original charts of patients Jackson, Fogle, and Clark, which at that time were seen by Dr. Hooper on the seat of Winchell's car, were never again located at Deer Park (J.A. 716-717). They were introduced in evidence by Kelberman at the subsequent criminal trial of Dr. Hooper (J.A. 717). See, infra. When

Winchell was at Deer Park on her final visit, she made the comment (J.A. 718, 720):

> My work is finished. The State will soon take over.

In late March, 1980, about two weeks after Winchell's last visit to Deer Park, the MFCU commenced an investigation of Dr. Hooper and Deer Park (A.5). Thousands of documents were subpoenaed, including the charts of patients Jackson, Fogle, and Clark (J.A. 717). As stated above, these charts could not be located because they previously had been removed by Winchell during one of her "discovery" visits which occurred after she contacted and met with the State.

In the Spring of 1982, Dr. Hooper was tried in Montgomery County Maryland Circuit Court on a 330 Count criminal information. At the close of the State's six-day presentation of its case a judgment of acquittal was directed by the court because the State failed to prove a prima facie case (A. 5).

The missing charts of Jackson, Fogle, and Clark were introduced as evidence at the criminal trial (J.A. 717). Furthermore, a number of charts were introduced in evidence by the MFCU on which the patient name had been whited-out. These charts obviously were obtained from Winchell who had been instructed by the MFCU in the initial meeting to white-out the patient names on charts she procured from Deer Park and furnished to the MFCU. J.A. 716-718, 740-741.

In September, 1982, Hooper and Deer Park filed the instant action alleging civil rights violations (J.A. 3, 18-24). Following dismissal of the initial complaint (A. 9-17), leave was granted to file an amended complaint alleging a Fourth Amendment violation -- that Winchell was acting as an agent of the MFCU when she copied and removed documents from Deer Park in March, 1980 --

after she contracted and met with the MFCU (A. 38-39).

The district court denied subsequent motions to dismiss (A. 38-110). It held, inter alia, that to prove a Fourth Amendment violation plaintiffs must prove (1) that Winchell delivered documents to the MFCU after her initial meeting with the MFCU in February, 1980; (2) that the documents so delivered were different from those she initially provided; (3) that the MFCU directed Winchell to obtain additional records; and (4) that Winchell would not have done so but for the MFCU's direction (A. 57-58).

The testimony of the defendants was inconsistent and self-contradictory respecting contacts with Winchell and the total number of Deer Park charts Winchell

delivered and when she produced them.4/ In a contemporaneous memorandum, and in a 1982 deposition, Kelberman stated Winchell turned over 10 or 11 vouchers and charts at the February 27, 1980, meeting (J.A. 506-507, 870). Tartaglino stated in an affidavit in support of the summary judgment motion that Winchell turned documents over to the MFCU only once (J.A. 499). However, in deposition (J.A. 872-874, 963) he testified she produced more documents later. Defendants

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4/ Winchell's testimony concerning going to the MFCU and her purpose for so doing also was self-contradictory. In 1983 she testified she sought advice from her attorney, John Stoppleman, before contacting the MFCU (J.A. 847). After her attorneys were called to testify and stated that Winchell did not seek their advice or turn over "discovered" documents to them (J.A. 921-923, 940, 946-947), Winchell, in 1986, changed her story, stating that she did not seek legal advice and may not have turned the discovery over to her counsel (J.A. 847, 851-856, 859-862, 923, 942). She also admitted that when she contacted the MFCU she was becoming very concerned with the ongoing expense of her suits against Hooper and Deer Park and that the problem of expense was causing her domestic problems (J.A. 861-862). See also, J.A. 919, 924-925.

admitted that Winchell gave them a total of about 27 charts and that from 5 to 15 percent of the documents used by the MFCU at Hooper's criminal trial came from Winchell (J.A. 743, 907). Thus, it is clear Winchell did turn over Deer Park documents (charts and vouchers) to the MFCU after her initial February meeting with Tartaglino, et al., and that those documents were different from the ones she originally provided. Apart from personal delivery, the record is clear Winchell mailed documents to Tartaglino about March 23, 1980. See, J.A. 732-738. In that communication, Winchell makes reference to the missing Jackson, Fogle, and Clark charts. See, J.A. 734-736.

Further, Anton Keating, former Chief Counsel to the MFCU at the time he testified, stated that they "didn't know what they [the MFCU] were doing" (J.A. 884) and that

Tartaglino had "a DEA mentality"5/ as well as a different view of constitutional rights. Most importantly, he stated that in some instances the MFCU did ask private individuals to obtain additional documents for them, that the MFCU was willing to take any help it could get, that they "might have" (see also, J.A. 869) asked Winchell to get more documents from Deer Park, and that if Tartaglino had any legal questions about what to do, he might have talked only with Kelberman.6/ J.A. 877-884.

Defendants and Winchell, who at the time was a defendant, all denied that

5/ "DEA" refers to the Drug Enforcement Administration, where Tartaglino formerly had been employed.

6/ Kelberman, during the prosecution, accepted what he believed to be information harmful to Dr. Hooper from one of Hooper's former defense counsel (J.A. 756-758). He also permitted another MFCU investigator (Rose) to testify at Hooper's trial that all of the Deer Park documents introduced in evidence at Hooper's trial came via the MFCU's subpoena. Though Kelberman knew some of the documents came from Winchell, he did not inform Rose, and he made no effort to correct Rose's testimony. J.A. 740-745.

Winchell was instructed to obtain additional documents at or subsequent to the February 27, 1980, meeting. However, documents which may have related to communications with, or documents from, Winchell between February 28 and March 24, 1980 -- plainly, a critical period -- were missing from the MFCU's files when they finally were produced in discovery after motions to compel. See, J.A. 447-465, 979-999, 1001, 1004-1013. The files were in the custody of the State at all times (J.A. 997-999).

3. Decisions Below

Following plaintiffs' discovery, defendants moved for summary judgment. Despite contradictions in the testimony, credibility issues, missing documents under control of the defendants relating to a time period critical to the issues involved, and the differing inferences the district court itself stated reasonably could be drawn from the evidence adduced, including especially

the meaning of Winchell's statement that her work was finished and that the State would soon take over (see, A. 114-117), the district court granted summary judgment for defendants (A. 122-125), stating that the case was just on the side of the line requiring judgment for defendants (A. 114).

The court of appeals summarily affirmed. In an unpublished per curiam opinion (A. 1-7), it stated that there was no direct evidence that the MFCU encouraged[7] Winchell in her activity and that the absence of direct evidence together with the defendants' sworn denials of facts solely

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7/ The court of appeals seemingly modified the district court's holding that specific direction of Winchell need be proven to establish a Fourth Amendment violation. See, e.g., United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985), certiorari denied, 474 U.S. 1034; United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981); United States v. Merkjian, 505 F.2d 1320, 1328 (5th Cir. 1975). As this Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971), it is not possible to reduce "Fourth Amendment law to complete order and harmony."

within defendants' knowledge validated the district court's summary judgment. The court of appeals did not discuss defendants' conflicting and inconsistent testimony, their demonstrably false testimony on other relevant matters, the fact that documents in defendants' control relating to a period critical to this case were "missing", and did not consider the evidence in light of all the existing circumstances. Rather, as stated above, it considered defendants' denials and the lack of direct evidence to the contrary in isolation from the rest of the record, and on that basis found judgment for defendants appropriate (A. 6-7).

ARGUMENT

A. Summary Judgment Requires Further Clarification

We respectfully submit that no Rule of the Federal Rules of Civil Procedure has produced more confusion and less consistent application than Rule 56 -- especially Rule 56(b) and (c) concerning summary judgments

for defendants. As the Tenth Circuit recently observed, "[T]he debate about summary judgment continues...". Windon Third Oil & Gas v. FDIC, 805 F.2d 342, 345 (1986).

Properly applied, summary judgments are an economy for both litigants and the judicial system. The Rule is intended to result in a judgment only when there is no genuine dispute as to any material fact. It is not intended to substitute for a trial, and summary judgment should not be awarded when an issue turns on credibility. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., ____U.S.____, 106 S. Ct. 2505, 2513 (1986). In Anderson, this Court cautioned that its opinion should not be read as a license for over zealous grants of

summary judgments stating (106 S. Ct. at 2514-2515):

> We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

The Court further warned that "[i]f reasonable minds could differ as to the import of the evidence, ... a verdict [or summary judgment] should not be directed." Id. at 2511.

The general admonitions of this Court and the courts of appeals against a rush to judgment notwithstanding, application of the standard has not been either simple or uniform. On the one hand, a court of appeals has said that a bare assertion to support a fanciful allegation where the facts are within the exclusive control of the defendant, and could be obtained only by discovery, is insufficient to defeat a motion for summary judgment. See, Knight v. U.S.

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Fire Ins. Co., 804 F.2d 9, 12 (2nd Cir. 1986), certiorari denied, ___U.S.___, 107 S. Ct. 1570. By contrast, other courts of appeals have stated that there are some facts it usually is difficult, if not impossible, to show by direct evidence, and accordingly circumstantial evidence will suffice to defeat a defendant's motion for summary judgment. See, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3rd Cir. 1987) (en banc), petition for certiorari pending; Wakefield v. Northern Telecom, Inc., 813 F.2d 535, 540 (2nd Cir. 1987). Indeed, the same courts which will affirm findings of administrative agencies based on the "substantial evidence" standard will deny a party the Constitutional right to trial by jury in a civil case on evidence they would find "substantial" in their review

of administrative adjudications.8/ See, e.g., NLRB v. Overnite Transportation Company, 308 F.2d 279, 282 (4th Cir. 1962) ("'The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence'"); Virginia Steel Corporation v. NLRB, 300 F.2d 168, 174 (4th Cir. 1962) (to like effect).

Perhaps most unsettling is permitting criminal cases to go to a jury, and affirming convictions, based on evidence on which the same court would grant summary judgment for a civil defendant. While the standard of proof

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8/ We recognize that the "substantial evidence" standard is more akin to a motion for judgment n.o.v. than to motion for summary judgment or for a directed verdict because it is a review of all the evidence after a decision on the factual issues has been rendered, rather than a legal determination that only one reasonable conclusion is permissible before the trier of fact has resolved the issues. Nonetheless, there are more similarities than differences in the standards applicable to the respective judicial determinations. Only consistency in the application is lacking.

required for a conviction of criminality is said to be higher and stricter than that required in a civil case, the fact is that criminal cases proceed to a jury verdict in circumstances in which the plaintiff might well suffer a summary judgment against him in a civil case where the burden of proof is the less stringent "more probable than not." See, e.g., United States v. Martino, 759 F.2d 998, 1005 (2nd Cir. 1985) (jury may consider false exculpatory statement as evidence of guilt); United States v. Barnes, 604 F.2d 121, 147 (2nd Cir. 1979), certiorari denied, 446 U.S. 907 (showing large amounts of unexplained cash probative of allegation of drug trafficking); United States v. Sanchez, 722 F.2d 1501, 1505-1506 (11th Cir. 1984), certiorari denied, sub nom. Gonzales v. United States, 467 U.S. 1208 (jury free to choose among reasonable construction of evidence and make reasonable inferences and choices, and not necessary such evidence

exclude every reasonable hypothesis of innocence.)

We demonstrate below that the court of appeals, without discussion, has affirmed a district court's grant of summary judgment, which, on its face, recognizes that different reasonable inferences are possible from the evidence of record, and that the court of appeals erroneously has set a requirement for direct evidence of facts exclusively within defendants' knowledge and control.

It is, we submit, appropriate for this Court to exercise its power of supervision both on the merits of this case -- the improper grant and affirmance of summary judgment -- and as a vehicle for clarification and further creation of uniform standards in the lower courts.

B. Summary Judgment Was Inappropriate in This Case

The sum and substance of the evidence of record, as set forth in the Statement, supra, is as follows. Winchell contacted

Tartaglino. She met with him, Kelberman, and, at least for part of the time with Keating, on February 27, 1980. At that time, according to a memorandum by Kelberman, dated February 28, 1980, Winchell provided copies of 10 or 11 patient charts and related vouchers from Deer Park. She also informed MFCU employees Tartaglino and Kelberman that she was engaged in civil litigation with Deer Park and Hooper and that she had an opportunity to return to Deer Park to get additional documents. While defendants denied there was any instruction given for Winchell to return to Deer Park and get more documents for the MFCU, the former Chief Counsel for the Unit testified that he was unsure whether or not more documents were asked for and that it was not unlikely that such a request would have been made. See also, J.A. 869 where in 1982 the substance of Kelberman's answer to this question is that he does not remember.

On March 10 and 12, 1980, Winchell returned to Deer Park to do further discovery pursuant to the order she obtained from the Montgomery County Circuit Court. That order was granted from the bench on February 22, 1980, five days prior to Winchell's February 27, 1980 meeting with the MFCU.

When Winchell returned to Deer Park in March, 1980, she removed at least three original patient charts and copied others. Those three original charts (Jackson, Fogle, and Clark), which had been seen at Deer Park shortly prior to Winchell's March 10 visit, and plainly had been there subsequent to Winchell's November, 1979, visits, were seen on March 10 on the seat of Winchell's car by Dr. Hooper. They were not seen thereafter at Deer Park and could not be located by Deer Park in response to the MRCU's subpoena, issued the end of March, 1980. However, the Jackson, Fogle, and Clark charts were used as evidence by the MFCU at Dr. Hooper's criminal

trial, as were other documents provided to the MFCU by Winchell from her March, 1980, discovery. In fact, the MFCU's own documents establish that the Jackson, Fogle, and Clark charts were provided to the MFCU by Winchell and that those charts could not be found at Deer Park. See, J.A. 760-770. In interviewing a former Deer Park employee, Tartaglino specifically made reference to "George Ann [sic] Clark's chart" (J.A. 760).

By order of the Montgomery County Circuit Court, Winchell was directed to keep confidential names of patients on charts she copied. Charts used in evidence at the Hooper criminal trial included charts with last names blotted out, and, as stated above, included the charts of Jackson, Fogle, and Clark. According to Kelberman, Winchell provided a total of 27 charts -- obviously more than the 10 or 11 she provided at the February 27 meeting. Thus, it is clear

Winchell provided materials from Deer Park after February 27.

Other documents provided by defendants establish that Winchell supplied additional documents after the February 27 meeting. In an envelope postmarked March 23, 1980, and addressed to Tartaglino, Winchell sent a handwritten list indicating other charts and related Deer Park documents she had obtained. The following day, Tartaglino made a trip, concerning Deer Park, to Montgomery Village, which is where Winchell's office was located (J.A. 730, 780-781). Below a double line on that list are the names of Medicaid patients whose charts Winchell stated were "in her attorney's office."9/ Included among the names below that double line are the names Ray Jackson, William Fogle, and Georgann Clark -- the

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9/ As stated, supra, Winchell did not give these documents to any of her counsel.

patient charts Hooper saw in Winchell's car on March 10, 1980, and which were not thereafter found at Deer Park.

There is no direct evidence that Tartaglino, et al., encouraged Winchell in her activities; however, there is circumstantial evidence, which is reenforced by the fact that Kelberman, Tartaglino, and Winchell have been far less than candid with respect to those things on which there is direct evidence which contradicts their evasive and inconsistent testimonies. The resolution of the latter two issues turned, of necessity, on the credibility of the defendants considered in the light of all circumstances, including their demonstrably untrue testimony as to other matters.10/

10/ In this regard, we again note that defendants produced their investigatory file in the Hooper matter only after our motion to compel was granted. See, J.A. 448-454. Certain documents were missing from those files when they were produced. The documents in the file were sequentially numbered. From this we could tell that documents inserted or [continued next page]

Defendants clearly were not entitled to summary judgment.

The court of appeals simply failed to consider the entire record in this case. It culled out and isolated one part of the evidence. But, that is not all there was. As set forth, supra, defendants plainly were inconsistent and untruthful with respect to other elements of which the district court required proof.

Just as surely as a jury is entitled to consider a false exculpatory statement as evidence of guilt in a criminal case, it is entitled to consider defendants' denials in

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10/ [continued] written during periods critical to this case -- February 28-March 3, 1980, March 19-March 27, 1980, April 15-May 2, 1980, May 7-May 13, 1980, May 14-June 6, 1980, June 12-June 13, 1980, June 25-June 30, 1980, July 24-July 31, 1980 -- were missing and had not been produced. Ultimately virtually all documents were produced (see, J.A. 1004-1005), excepting, of course, documents that would have been produced or filed during a period of time critical to plaintiffs' claims -- February 28-March 24, 1980. The inference to be drawn is not favorable to defendants.

the context of their other false statements and missing documents under defendants' control and relating to a critical time concerning Winchell and the defendants in determining whether defendants were being truthful as to matters peculiarly within their knowledge. A jury also is entitled to use its common sense in evaluating the evidence against defendants. It also is entitled to consider Winchell's statement at Deer Park that "the State will soon take over."

In evaluating these things, the district court made ultimate conclusions. It was no more entitled to enter summary judgment on that basis than it would have been if it believed that plaintiffs ultimately would not prevail before a jury. See, McBride v. Merrill Dow and Pharmaceuticals, Inc., 800 F.2d 1208, 1212 (D.C. Cir. 1986).

While we do not believe the evidence compels a verdict for plaintiffs, we do think a verdict for plaintiffs is a permissible reasonable conclusion. If that is so, based on the entire record, the decision of the court of appeals must be reversed.

Circumstantial evidence and matters of credibility cannot be considered in isolation. If direct evidence were required to prove agreements, motive, and intent, such a case rarely, if ever, could be won. To so require, especially in a civil context, is to license wrongdoing, and to convert the summary judgment procedure into an illegitimate shield for the wrongdoer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 30, 1987, I caused three (3) copies of the foregoing Petition and three (3) copies of the Appendix to the Petition to be mailed, first-class, postage prepaid, to Andrew H. Baida, Esquire, Office of the Attorney General, Munsey Building - 2nd Floor, 7 North Calvert Street, Baltimore, Maryland 21202.*/

STEPHEN A. ARMSTRONG

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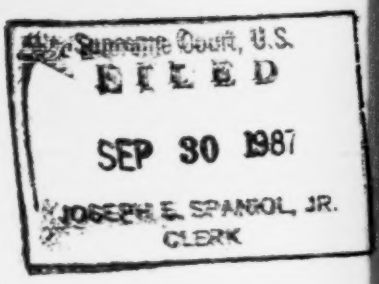
*/ The Petition and Appendix were served and filed on the above date. Substituted copies of the Petition with typographical errors corrected have been served, and a separate Certificate of Service has been filed.

HOO.BR

87-514 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1987



JAMES L. HOOPER AND
DEER PARK MEDICAL GROUP, P.A.,

Petitioners,

v.

STEPHEN H. SACHS, DALE P. KELBERMAN,
AND ANDREW C. TARTAGLINO,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 86-1623

JAMES L. HOOPER; DEER PARK MEDICAL GROUP, P.A., a Maryland professional corporation

Plaintiff-Appellant

v.

STEPHEN H. SACHS; DALE P. KELBERMAN; HENRY AARON ROSE; ANDREW TARTAGLINO

Defendant-Appellee

and

STATE OF MARYLAND; JOHN STOPPLEMAN; CHERYL WINCHELL; JEFFREY ROSEN; STOPPLEMAN AND ROSEN

Defendant

PER CURIAM:

Dr. James L. Hooper and Deer Park Medical Group appeal from the district court's grant of summary judgment in favor of Stephen H. Sachs, Dale P. Kelberman and Andrew J. Tartaglino, 1/ the defendants in Hooper's 42 U.S.C. Section 1983 action based on an alleged fourth amendment violation. In his complaint, Hooper alleged that the defendants violated his fourth amendment rights by using a private individual, Dr. Cheryl Winchell, to illegally search and seize his medical records. Hooper contends on appeal that the district court erred in granting summary judgment to the defendants because a genuine issue of fact was in dispute. We disagree and affirm.

Hooper is the president of the Deer Park Medical Group, a Maryland professional

1/ When this litigation was commended, Sachs was the Attorney General of Maryland, Kelberman was an Assistant Attorney General and Tartaglino was chief investigator for the Medicaid Control Fraud Unit.

association. Winchell joined Deer Park as a doctor-employee in 1973 and became a shareholder in 1975 when whe acquired 50 of the 150 shares of stock in the corporation. Winchell left Deer Park in 1978, however, and filed suit against Hooper and Deer Park in state court, requesting an accounting and a dissolution of Deer Park. Among other things, her complaint also alleged Medicaid fraud.

In May 1979, Winchell requested that Hooper produce documents potentially relevant to her lawsuit. When he refused, she moved to compel production and her motion was granted in September 1979. She filed a motion for additional discovery in December 1979. While this motion was pending, Winchell telephoned the Medicaid Fraud Control Unit (MFCU) of the Maryland Attorney General's office on February 21, 1980, and spoke with Tartaglino. She indicated she had information regarding Medicaid fraud

occurring at Deer Park and agreed to meet with MFCU personnel on February 27, 1980. On that day, Winchell met with MFCU personnel Kelberman, Tartaglino, and Anton Keating and provided them with documents she had already obtained through previous discovery. These documents indicated that Deer Park had billed patients (and Medicaid) for visits not reflected on the patients' charts.

Between Winchell's telephone conversation with Tartaglino and her subsequent meeting with MFCU personnel, a hearing was held on her motion for additional discovery. The state court partially granted her request, ordering that she

> shall have discovery of all Medicaid vouchers and corresponding plaintiff [sic] charts for the period January 1, 1975 to the present; said discovery to consist of plaintiff's inspection and photocopying of those documents shee [sic] deems relevant, and this inspection and photocopying are to take place on Monday, March 10, 1980, ... and on Wednesday, March 12, 1980. . . .

Pursuant to the state court's order, Winchell returned to Deer Park and conducted discovery on March 10 and 12.

Following Winchell's additional discovery efforts and a subsequent investigation by the MFCU, the state brought criminal charges against Hooper for Medicaid fraud. The charges ultimately were dismissed, however, because the state could not produce sufficient evidence of Hooper's guilt. Hooper and Deer Park then filed this Section 1983 action, alleging that Winchell was acting as a government agent when she conducted discovery on March 10 and 12, and that her actions thus constituted an unreasonable search and seizure in violation of Hooper's fourth amendment rights. After the parties completed discovery on the Section 1983 action, the defendants moved for summary judgment. The district court granted the motion, ruling that no genuine issue of material fact existed because Hooper had not

presented sufficient evidence to establish that Winchell might have been a government agent, a necessary element for a fourth amendment violation. See United States v. Jacobsen, 466 U.S. 109, 113 (1984) (fourth amendment inapplicable to actions by private individuals).

To establish that Winchell acted as a government agent when she conducted discovery at Deer Park on March 10 and 12, 1980, Hooper had to show, inter alia, that the government encouraged her activity. See United States v. Lambert, 771 F.2d 83, 89 (6th. Cir.), cert. denied, 106 S. Ct. 598 (1985); United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981). On appeal, Hooper contends that a genuine issue existed over this fact and the district court therefore erred in granting summary judgment. We disagree. The record is devoid of any direct evidence that the MFCU personnel encouraged Winchell to obtain information for them, and Hooper

offered no more than speculation and conjecture to support that position. On the other hand, Winchell testified at her deposition that the MFCU personnel "made it very clear to me that my litigation and their investigation were two separate things." Morevoer, Kelberman and Tartaglino submitted signed affidavits stating that they neither directed nor encouraged Winchell to obtain additional documents.2/

In view of the above, the judgment of the district court is affirmed.

AFFIRMED

OP.HOO

2/ The defendants contend that Hooper and Deer Park's claim is also barred by the statute of limitations. In light of our holding, we need not address this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	M82-2870
STEPHEN H. SACHS, et al.	:	
	:	
Defendants.	:	

MEMORANDUM

The plaintiffs brought this civil action pursuant to 42 U.S.C. Section 1983 and its jurisdictional counterpart, 28 U.S.C. section 1343(3), alleging violations of their civil rights stemming from the criminal prosecution of plaintiff Hooper for Medicaid fraud. Named as defendants were the State of Maryland;1/ four officials of the State including Attorney General Sachs, Assistant Attorney General Kelberman, and two investigators with the Attorney General's Office, Tartaglino and Rose; and a private citizen, Winchell.

In Count I, the plaintiff Hooper alleges that the defendants in their investigation and prosecution of him conspired to deny him his civil rights "to be free of malicious

1/ The State of Maryland was later dismissed. See Paper 28.

prosecution, abuse of process, false arrest, trespass, and ultra vires prosecution, vindictive prosecution, invasion of privacy and unwarranted publicity."2 The plaintiff Deer Park Medical Center alleges that the defendants interfered with its right to conduct lawful business.3/ The plaintiff Hooper also alleges that the defendants Sachs and Kelberman deprived him of Due Process.4/ Counts II and III were dismissed previously.5/

The defendants, Sachs, Kelberman, Rose, and Tartaglino, have moved for judgment on the pleadings, 6/ plaintiffs have

2/ Complaint at Paragraph 12.

3/ Complaint at Paragraph 13.

4/ Id. The court assumes that Paragraph 14 alleges a denial of due process as to the plaintiff Hooper only. It is phrased in the singular, "plaintiff," and it names Sachs and Kelberman only as defendants. They prosecuted only Hooper.

5/ Paper 28.

6/ Papers 31 & 65.

responded,7/ and the defendants have replied.8/ The defendant Winchell has moved for summary judgment,9/ and the plaintiffs have responded.10/ The court has considered the motions, responses and reply and has determined that decision without oral hearing is appropriate. Local Rule 6(E).

I. Statement of Facts

The gravamen of the plaintiffs' complaint is that Dr. Cheryl Winchell, an ex-member of the plaintiff Deer Park Medical Center (Deer Park), and an ex-coworker of the plaintiff, Dr. James L. Hooper, supplied the Attorney General's Office with false information which led to prosecution of the plaintiff Hooper for "false pretenses" involving alleged Medicaid fraud. The plaintiffs allege that Dr. Winchell, Attorney General Sachs, and

7/ Paper 77a.

8/ Paper 80.

9/ Paper 59.

10/ Paper 78.

members of the Attorney General's Office conspired to violate the plaintiffs' rights.

In August, 1980, a Montgomery County, Maryland Grand Jury indicted Dr. Hooper on six counts of false pretenses. The Montgomery County Circuit Court dismissed the indictment. While this dismissal was on appeal to the Maryland Court of Special Appeals, the Attorney General brought a 330-count criminal information against the plaintiff Hooper. The Court of Special Appeals reinstated the indictment, but while appeal was pending before the Maryland Court of Appeals, the Attorney General withdrew the indictment.11/

The present suit alleges not only that the information giving rise to the criminal charges was false, but also alleges that the Attorney General was without authority to proceed in a Medicaid fraud case by criminal

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11/ Complaint at Paragraph 16.

information.12/ It is this latter allegation which gives rise to the claim of Hooper that Sachs and Kelberman violated his right to Due Process.13/

II. Discussion

"The first inquiry in any Section 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Baker v. McCollan, 443 U.S. 137, 140 (1979), quoting 42 U.S.C. section 1983. Section 1983 does not impose liability for a mere violation of state tort law. A civil rights claim depends on a deprivation of constitutional magnitude.

The Fourth Circuit has expressly held that the state law torts of malicious prosecution and abuse of process do not allege a deprivation of constitutional rights. Cramer v. Crutchfield, 648 F.2d 943, 945 (4th Cir. 1981). Accord Occhino v.

12/ Id. at Paragraphs 17 & 18.

13/ Id. at Paragraph 14. See note 4 supra.

United States, 686 F.2d 1302, 1311-12 (8th Cir. 1982); Pollard v. Baskerville, 481 F. Supp. 1157 (E.D. Va. 1979), aff'd, 620 F.2d 294 (4th Cir. 1980). See also Riggs v. Miller, 480 F. Supp. 799 (E.D. Va. 1979). Therefore, Hooper's allegations of malicious prosecution and abuse of process do not state a cause of action under 42 U.S.C. section 1983. Similarly, his claims of false arrest,14/ trespass, ultra vires prosecution, vindictive prosectuion, invasion of privacy

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14/ Although false arrest can rise to the level of a constitutional deprivation when it results in loss of liberty without due process of law, see Baker v. McCollan, 443 U.S. 137, 145 (1979), the plaintiff has not alleged that he was deprived of his liberty at all. Moreover, the Supreme Court has made it clear that even a false arrest resulting in three days' imprisonment will not give rise to a cause of action under section 1983 where there is a valid warrant. Id. The plaintiff herein has not alleged the invalidity of any warrant.

15/ and unwarranted publicity, if they state a cause of action at all, state one under Maryland tort law only.

The only injury expressly alleged to have been suffered by the plaintiff Deer Park was an interference with the conduct of its lawful business. Deer Park has not provided specific factual allegations with respect to this injury, but it has alleged that defendants were responsible for adverse publicity concerning it. Damage to reputation is not a loss of liberty or property sufficient to state a constitutional

---

15/ The complaint alleges the prosecution was instituted for publicity purposes, but no other allegations giving rise to a claim of invasion of privacy are present. Injury to reputation does not give rise to a cause of action under section 1983. See text infra. Plaintiff Hooper states in his affidavit that the defendant Winchell acted at the direction of, or in concert with, state investigators in conducting an illegal search of Deer Park records. These claims are not a part of the complaint, however. Even if they were, a cause of action pursuant to section 1983 may be foreclosed by Allen v. McCurry, 449 U.S. 90 (1980).

deprivation. Paul v. Davis, 424 U.S. 693 (1976).

The only remaining issue is whether the action of Attorney General Sachs and Assistant Attorney General Kelberman in bringing the criminal prosecution by information, rather than indictment, is actionable under section 1983. Assuming that a constitutional deprivation were alleged by the allegations of denial of due process, and that the Attorney General was without authority to proceed by information,16/ Sachs and Kelberman would still not be liable. They enjoy absolute immunity for their prosecutorial acts done within the scope of their authority. See Imbler v. Pachtman, 424 U.S. 409 (1976).

The plaintiff's contention that Sachs and Kelberman acted beyond the scope of their

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16/ This precise issue was decided against the plaintiff Hooper in the Circuit Court for Montgomery County. See State Defendants' Reply, Paper 80, Ex. A at p. 4.

authority is without merit. Hooper does not contend that they were without authority to initiate criminal prosecution against him, but argues merely that their decision to proceed by information, rather than indictment, transformed the prosecution into one beyond their authority. This interpretation of "beyond the scope" is entirely too narrow. It would subject prosecutors to suit for each technical error made in the course of prosecution. Such a narrow reading would undermine the intent of the Supreme Court in Imbler to permit the prosecutor to carry out his public duty without the threat of civil liability. Id. at 424.

For the foregoing reasons, the motions of the defendants for judgment on the pleadings and summary judgment 17/ will be granted.

Date: June 9, 1983 /s/
James R. Miller, Jr.
United States District Judge

17/ The defendant Winchell did not rely expressly on a failure to state an injury of constitutional magnitude, in her motion for summary judgment, but it was fairly raised by her Answer, Paper 3, and Memorandum accompanying her motion, Paper 59 at 4. Furthermove, the plaintiffs had fair notice of the issue as it was raised by the other defendants.

HOO.MEM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	M82-2870
STEPHEN H. SACHS, et al.	:	
	:	
Defendants.	:	

ORDER

For the reasons expressed in the accompaying Memorandum, it is this 9th day of June, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The motion of defendants Sachs, Kelberman, Rose and Tartaglino for judgment on the pleadings (Papers 31 and 65) is GRANTED.

(2) The motion for summary judgment of the defendant Winchell (Paper 59) is GRANTED.

(3) Judgment shall be entered for all defendants.

(4) The plaintiffs' motion for further extension of time to file a motion to compel (Paper 75) is DENIED as moot.

(5) The plaintiffs' motion to supplement their opposition to the defendants' motion for judgment on the

pleadings (Paper 76) is GRANTED to the extent that it seeks to have a new page 5 of its original memorandum substituted and DENIED to the extent that it seeks to raise new undisclosed issues.

(6) The hearing scheduled for Friday, June 10, 1983, has been CANCELLED.

(7) The Clerk shall mail a copy of this Order and the accompanying Memorandum to counsel for the parties.

/s/
James R. Miller, Jr.
United States District Judge

HOO.ORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	M82-2870
STEPHEN H. SACHS, et al.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

This court granted the motion of the State defendants, Sachs, Kelberman, Rose and Tartaglino, for judgment on the pleadings (Papers 31 & 65) and the motion for summary judgment of the defendant Winchell (Paper 59). The plaintiffs have moved for reconsideration or, alternatively, for leave to file an amended complaint (Paper 88) have responded and the plaintiffs have replied (Paper 89). The court has concluded that decision without oral hearing is appropriate. Local Rule 6(E).

I.

The plaintiffs have challenged the court's conclusion that the plaintiffs suffered no injury of constitutional magnitude sufficient to sustain their tort claims, i.e., malicious prosecution and abuse

of process, pursuant to Section 1983. They argue again that the injury Hooper suffered was a denial of Due Process in having been brought to trial on false information and by incorrect procedures. Due Process is a constitutional right, but the denial of Due Process, without more, is not actionable. There must be some loss of liberty or property to which the denial of Due Process attaches. The plaintiffs cite the court to Claine v. Bursett, 661 F.2d 108 (9th Cir. 1981), for the proposition that malicious prosecution results in a deprivation that is actionable under Section 1983. The deprivation in Claine, however, was the imprisonment of the plaintiff in that case, obviously causing a loss of liberty. Having to stand trial on criminal charges is not, in and of itself, an injury to liberty or property. See Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980).

The plaintiffs argue also that both Hooper and Deer Park alleged injury to reputation and concomitant economic injury. To the contrary, paragraph 13 it alleged that the defendants "interfered with the rights of plaintiff Deer Park to conduct lawful business." That is the only allegation with respect to economic injury in the original complaint.

The nature of the injury is unclear, but the plaintiffs argue in their motion for reconsideration that the injury is one of damage to reputation and goodwill. They cite Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), for the proposition that injury to reputation and the goodwill of a business is a property interest protected by the Fifth and Fourteenth Amendments.

Assuming the allegations in Deer Park's original complaint allege a damage to reputation and goodwill, the Fourth Circuit has disapproved, implicitly, the holding of

the Fifth Circuit. See Becker v. Russek, 518 F. Supp. 1040 (W.D. Va. 1981), aff'd mem., 679 F.2d 876 (4th Cir. 1982).

The allegations of the proposed amended complaint do not bring the alleged injury within constitutional protection. The amended complaint merely states that both plaintiffs suffered injury to reputation and economic injury. Presumably, it is the same type of injury to reputation and goodwill or business opportunity alleged in the original complaint.

II.

Finally, the plaintiffs seek reconsideration of the court's conclusion that Sachs and Kelberman are immune for their acts in initiating prosecution by information rather than indictment. It should be noted, first, that this was an alternative holding based on the assumption that a constitutional deprivation has been alleged. Nevertheless, the court reaffirms its alternative holding

that Sachs and Kelberman were acting within the scope of their authority in initiating prosecution by information rather than indictment.

III.

The amended complaint at paragraph 18 also seeks to allege that the State defendants were without authority to prosecute for any period more than five years prior to the time of the investigation because Medicaid providers are not required to keep records longers than five years. Permitting amendment based on these allegations would be futile because (1) the claim is still one for malicious prosecution which the court has held cannot be the basis for a Section 1983 action under the facts alleged here, and (2) it is an act in initiating prosecution for which the defendants, Sachs and Kelberman, are entitled to immunity.

IV.

The plaintiffs in the proposed amended complaint have also sought to state a cause of action based on the alleged gross negligence of the defendants, Sachs and Kelberman, in supervising subordinates. Since, with one exception, these allegations are in reality an alternative factual basis for the attempt to state a cause of action for malicious prosecution, abuse of process, and denial of Due Process, they fail to state a cause of action under Section 1983 for the same reasons previously stated.

V.

While the plaintiffs, as noted above, have attempted to restate in the proposed amended complaint their Section 1983 causes of action based on malicious prosecution, abuse of process and denial of Due Process, this court has concluded that they have failed effectively to do so. While it is ordinarily appropriate to grant liberal

opportunity to amend a complaint, even after dismissal, see, 3 Moore's Federal Practice, Paragraph 15.10 at 15-140 (2nd ed. 1983), when amendment would be futile, the court is not required to allow amendment. For this reason, the plaintiffs' motion to amend will be denied as to these causes of action.

VI.

The proposed amended complaint does differ from the original in one significant respect. The plaintiffs have stated a cause of action under Section 1983 pursuant to the Fourth Amendment for warrantless search and seizure. These allegations are contained principally in paragraphs 14 and 18. The plaintiffs' allegations of gross negligence can also be construed to allege that the defendants were negligent in supervising the search procedure giving rise to the Fourth Amendment claim. The plaintiffs will be permitted to file their amended complaint to the extent and only to the extent that it

seeks to state a cause of action for warrantless search and seizure.

Accordingly, it is this 8th day of September, 1983, by the United States District Court for the District of Maryland, ORDERED:

1. The plaintiffs' motion for reconsideration (Paper 86) is DENIED.

2. The plaintiffs' motion for leave to file an amended complaint is GRANTED to the extent that the plaintiffs state a cause of action under Section 1983 for warrantless search and seizure in violation of the Fourth Amendment and DENIED in all other respects.

3. The Clerk is instructed to reopen the case as to all defendants for proceedings consistent with this Memorandum and Order.

4. The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

/s/
James R. Miller, Jr.
United States District
Judge

MEMORD.HOO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	M82-2870
STEPHEN H. SACHS, et al.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

On September 9, 1983, the plaintiffs, James L. Hooper and Deer Park Medical Group, were granted leave to file an amended complaint "to the extent and only to the extent that it seeks to state a cause of action [under Section 1983] for warrantless search and seizure." (Paper No. 94 at 4-5). In the amended complaint thereafter filed, Attorney General Stephen H. Sachs; Assistant Attorney General Dale Kelberman; two investigators with the Attorney General's Office, Messrs. Andrew Tartaglino and Harold Rose; and a private citizen, Dr. Cheryl Winchell, were named as defendants.

The defendants filed a motion to dismiss the amended complaint (Paper No. 98) and the plaintiffs responded (Paper No. 104). After a hearing on the motion, the parties were

directed to file supplemental memoranda and they have done so (Paper Nos. 112 & 113).

A decision on the motion to dismiss is pending. The plaintiffs have in the meantime moved to file a second amended complaint to add additional parties and additional pendent state claims (Paper No. 120). Defendant Winchell has opposed that amended (Paper No. 121), and the plaintiffs have replied to his opposition (Paper No. 122).

The second amended complaint seeks to add as defendants John Stoppleman and Jeffrey Rosen, individually, and Stoppelman and Rosen, a law firm in which Messrs. Stoppleman and Rosen are general partners. Both men were allegedly employed as counsel to defendant Winchell and in various ways collaborated in the deprivation of civil rights alleged herein.

The plaintiffs have realleged in the second amended complaint all allegations and causes of action set forth in the first

amended complaint. Leave to file the first amended complaint was granted only as to the warrantless search and seizure issue, however. The plaintiffs recognize that all claims except that Fourth Amendment claim have been disposed of by this court as to all defendants currently before the court. They state:

> "We do not by seeking to amend the complaint abandon our position that all claims set forth in our original complaint, and in our First Amended Complaint, set forth causes of action cognizable under 42 U.S.C. 1983. For that reason, we have realleged all matters set forth in the First Amended Complaint. We do not thereby seek further reconsideration of the Court's prior rulings with regard to our initial complaint, or the First Amended Complaint. The allegations are repeated solely to preserve our position. It is not our intent to require that either the State defendants or defendant Winchell (assuming leave to amend is granted) refile their pending motions to dismiss, currently under consideration by the Court. Similarly, we would anticipate that defendants Stoppleman and

> Rosen, and their law firm, can, pro forma, move to dismiss the 42 U.S.C. 1983 claims this court has ruled do not state a cause of action. As is the case with the State defendants and defendant Winchell, the claims are pled to preserve our position. So that our position is understood by the newly added defendants, and to avoid an unnecessary burden for them and for the Court, it is our intent to serve a copy of this motion and the accompanying memorandum on the newly named defendants, if the Court authorizes filing and service of the Second Amended Complaint."

(Paper No. 120 at 2).

The proposed amendment is subject to a valid motion to dismiss based on prior rulings in this case. Therefore, leave to amend is granted only as to the warrantless search and seizure claim set forth in paragraph 23 (formerly paragraphs 14 & 18 in the First Amended Complaint). As to all other claims, leave to amend is denied. See, e.g., 3 Moore's Federal Practice, Paragraph 15.08[4] at 15-109 and cases cited therein. (If a complaint as amended would be subject

to a Rule 12(b) (6) motion to dismiss, it would be an idle move for the court to allow such amendment).

Accordingly, it is this 3rd day of April, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That leave to amend is GRANTED in part and DENIED in part as set forth in this Memorandum and Order.

2. That the Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

/s/
James R. Miller, Jr.
United States District
Judge

MEMORD2.HOO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER and	:	
DEER PARK MEDICAL GROUP, P.A.	:	
	:	
v.	:	CIVIL ACTION NO. M-82-2870
STEPHEN H. SACHS	:	
DALE KELBERMAN	:	
ANDREW TARTAGLINO	:	
HAROLD ROSE	:	
CHERYL WINCHELL	:	
JOHN STOPPLEMAN	:	
JEFFREY ROSEN and	:	
STOPPLEMAN AND ROSEN	:	

Filed: September 16, 1985.

***

MEMORANDUM AND ORDER

On September 9, 1983, the plaintiffs, James L. Hooper and Deer Park Medical Group, P.A., were granted leave to file an amended complaint pursuant to 42 U.S.C. Section 1983 and its jurisdictional counterpart, 28 U.S.C. Section 1343(3), alleging violations of their civil rights stemming from an illegal search and seizure of certain records of the plaintiffs. Named as defendants were

Attorney General Sachs, Assistant Attorney General Kelberman, two investigators with the Attorney General's Office, Tartaglino and Rose, and a private citizen, Dr. Winchell. The plaintiffs were allowed to amend their complaint "to the extent and only to the extent that it seeks to state a cause of action [under Section 1983] for warrantless search and seizure." (Paper 94 at 4-5). This court stated that leave to amend was granted only as to those parts of paragraphs 14 and 18 of the proposed amended complaint (Paper 95) related to the Fourth Amendment claim. In addition, those parts of the complaint alleging gross negligence in supervising the search procedure giving rise to the Fourth Amendment claim (see Paper 95, Paragraphs 22-24) were also considered as part of the amended complaint (Paper 94 at 4).

The defendants filed a motion to dismiss the first amended complaint (Papers 98, 99,

103) and the plaintiffs responded to their motions (Paper 104).

On May 25, 1984, a hearing on the motions to dismiss was held in open court. After hearing the arguments of all parties, the court instructed counsel to submit post-argument memoranda directed to the statute of limitations issue. The parties did so (Papers 112 & 113).

While a decision on the issues presented in the motions to dismiss was pending, the plaintiffs sought, and were granted, in part, leave to file a second amended complaint to add as defendants, Stoppleman and Rosen, a law firm, and John Stoppleman and Jeffrey Rosen, lawyers who apparently acted as counsel for defendant Winchell in prior state court civil cases (Paper 123, Court Order; Paper 124 , Second Amended Complaint). Those new defendants filed a motion to dismiss the second amended complaint (Paper 130). The

plaintiffs have responded to that motion to dismiss (Paper 132).

I. Issues Before the Court

All defendants set forth similar arguments or adopt each other's arguments regarding the grounds on which the first or second amended complaint 1/ should be dismissed. They are:

1) The Fourth Amendment claim set forth in the amended complaint does not relate back to the original complaint.

2) As a result, the amended complaint is barred by the statute of limitations.

3) Even if the complaint is not time barred, it fails to state a claim as to each defendant.

1/ The court will consider all motions to dismiss filed as to the first amended complaint to apply also to the second amended complaint. Further, leave to file the second amended complaint was granted only as to the Fourth Amendment claim. That claim is set forth in paragraphs 23 and 27 of the second amended complaint (Paper 124). All references herein to the "amended complaint" refer to the second amended complaint.

4) Even if the complaint states a claim, the state defendants and Dr. Winchell are immune from suit.

II. Background

This case grows out of the prosecution of Dr. Hooper by the State of Maryland for Medicaid fraud. After the presentation of the prosecution's case, the state court apparently dismissed the criminal charges against Dr. Hooper. Dr. Hooper and Deer Park Medical Group, the professional association in which he is the main partner, subsequently filed suit in this court alleging numerous constitutional violations related to that prosecution. Only the alleged Fourth Amendment violation and related issues remain before this court for resolution.

Resolution of those issues requires an understanding of the relationship between Dr. Hooper and Dr. Winchell. After joining Deer Park Medical Group in 1972 as a doctor/employee, Dr. Winchell bought into the partnership in 1975. That partnership was

not satisfactory to her and in 1978 she left Deer Park and filed several civil suits in state court against Dr. Hooper and Deer Park Medical Group.

In Dr. Winchell's suit filed in equity, Winchell v. Deer Park Medical Group, et al., No. 64714 (Circuit Court for Montgomery County, October 11, 1978), she sought dissolution of the corporation, an injunction pendente lite and an accounting. Among the allegations stated in that complaint were allegations of Medicaid fraud (Paper 107, Ex. A, Complaint Paragraph 10(e)).

Dr. Winchell conducted discovery in her several state court cases, but the discovery conducted in the equity case provides the basis for the Fourth Amendment claims set forth in the second amended complaint. The gravamen of that amended complaint is that Dr. Winchell was acting as an agent of the state when, on March 10, 1980, she conducted discovery pursuant to a discovery order

issued in the equity case. Allegedly the state defendants directed her to obtain evidence for them of Medicaid fraud -- evidence, the plaintiffs contend, the state defendants had no legal right to obtain, at least not without a proper subpoena. The plaintiffs further contend that, even if the state defendants had attempted to obtain Medicaid records from Deer Park Medical Center with a subpoena, they could not have obtained records going back more than five years. They conclude that Dr. Winchell's copying of the Medicaid records and alleged subsequent delivery of some of them to the state defendants constituted an illegal search and seizure. Messrs. Stoppleman and Rosen and their law firm are implicated, because they allegedly advised Dr. Winchell to conduct the alleged illegal search and seizure for the benefit of the State.

Normally, because the motions pending before this court are motions to dismiss, the

court would not go beyond the amended complaint in deciding the issues. This case, however, has been before the court for almost three years. Motions to dismiss the complaint and amended complaints, and motions to reconsider have been presented and argued. Each party in previous motions has added to the record by providing exhibits and attaching depositions to the memoranda filed. Thus this court is cognizant of facts beyond the face of the second amended complaint -- facts which are relevant to the issues presented for resolution. Therefore, pursuant to Fed. R. Civ. P. 12(b), this court will consider the full record before it, converting the motions to dismiss to motions for summary judgment. In doing so, the court is aware that, at the request of the state defendants, discovery has been stayed pending resolution of the immunity issue. To the extent that further discovery may be necessary to resolve that issue or other

issues on summary judgment, such discovery will be ordered.

With those considerations in mind, the following chronology of facts, at this time, is not disputed.

As stated previously, Dr. Winchell initiated an equity action in state court on October 11, 1978 against Dr. Hooper and Deer Park. That court docket reveals that on May 31, 1979, Dr. Winchell filed a request for production of documents (Paper 107, Ex. B, docket entry 62). Apparently, Deer Park and Dr. Hooper refused to produce the requested documents, and, therefore, Dr. Winchell filed a motion to compel on June 26, 1979 (id., docket entry 77). A hearing was held on September 18, 1979 (id., docket entry 100), and on September 29, 1979, the court ordered that "Plaintiff shall be given full opportunity to examine each and every chart and associated documents that she chooses that are maintained by Defendants and select

such charts as she deems appropriate for the purpose of making copies thereof..." (id., docket entry 102). Dr. Winchell apparently conducted discovery pursuant to that order.

On December 10, 1979, Dr. Winchell filed a "motion for increased discovery" (id., docket entry 113). That motion was opposed (id., docket entries 116 & 117). While that motion was pending, Dr. Winchell called the Medicaid Fraud Control Unit of the Attorney General's Office.

In a memo to file dated February 21, 1980, Andrew Tartaglino, of the Medicaid Fraud Control Unit, stated that Dr. Winchell had called him on that date indicating that she had "information regarding Medicaid fraud taking place in the Deer Park Medical Group" (Paper 89, Dep. of Winchell, Ex. 1). An appointment was set at that time for Dr. Winchell to meet with the Medicaid Fraud Control Unit personnel on February 27, 1980 (id.).

The day after Dr. Winchell's initial phone call to Tartaglino a hearing was held on her motion for increased discovery, and her request was granted in part (Paper 107, Ex. B, docket entry 122). The court order, however, was not issued until February 29, 1980. That order stated that the plaintiff "shall have discovery of all Medicaid vouchers and corresponding plaintiff charts for the period January 1, 1975 to the present; said discovery to consist of plaintiff's inspection and photocopying of those documents shee [sic] deems relevant, and this inspection and photocopying are to take place on Monday, March 10, 1980 ... and on Wednesday, March 12, 1980" (id., docket entry 124).

Before she conducted that discovery, she met, as previously planned, with the Medicaid Fraud Control Unit. In a memo to file dated February 28, 1980, Dale Kelberman, of the Medicaid Fraud Control Unit, described in

detail his interview with Dr. Winchell on February 27, 1980. Mr. Kelberman stated in that memo "[Dr. Winchell] provided us with 10 or 11 sample vouchers and patients' charts which she had obtained pursuant to her Court Order which grew out of her law suit." (Paper 89, Winchell Dep., Ex. 2 at 2-3). He went on, "A review of the vouchers and patient charts presented to us by Dr. Winchell substantiates what she had told us since in each instance there are office visits billed where no record of such a visit is in the patient's chart." (Id. at 3).

It appears from the record that Dr. Winchell took documents to the Medicaid Fraud Control Unit on February 27, 1980 -- eleven days before she conducted the alleged illegal search and seizure. She was asked by plaintiffs' counsel at her deposition on April 27, 1983, whether the state defendants asked her "to bring to them any discoveritive evidence?" Dr. Winchell answered, "They

didn't request any further information other than what I brought them in the first meeting." She was also asked by plaintiffs' counsel, "Did they say they'd help you and you'd help them with any discovery of evidence?" Dr. Winchell answered, "No, they didn't say that." (Paper 89, Winchell Dep. at 15).

In summary, the deposition testimony of Dr. Winchell and the state court records indicate that Dr. Winchell approached the state defendants with some evidence of Medicaid fraud prior to her March 10, 1980 "search" of the records at Deer Park and that she provided no further information to the defendants after that March 10, 1980 "search."

With those facts in mind, and aware that the record before this court may not be fully developed, this court will consider the issues presented.

that the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ....' This text protects two types of expectations, one involving 'searches,' and the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property. [The Supreme Court] has ... consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government...." United States v. Jacobsen, ___U.S. ___, 52 U.S.L.W. 4414, 4415 (April 2, 1984) (citations omitted). It is recognized, however, that when a private

person acts as an instrument or agent of the state, Fourth Amendment considerations are implicated. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); United States v. Jennings, 653 F.2d 107, 110 (4th Cir. 1981); Annot., 44 ALR Fed. 547, 561-62 (1979).

The plaintiffs have alleged that Dr. Winchell was acting as an agent of the state when she conducted the alleged illegal search and seizure. The defendants argue that Dr. Winchell was not an agent of the state, and that this court can so conclude as a matter of law.

Whether a private individual is acting as an agent of the state requires a "highly fact-specific" inquiry. See United States v. Cova, 585 F. Supp. 1187, 1193 (E.D. Mo. 1984) citing C. Whitebread, Criminal Procedure Section 4.02 at 91 (1980); see also Coolidge v. New Hampshire, 403 U.S. at 487 ("[t]he test ... is whether [the private citizen] in

light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the State....").

Although a fact-specific inquiry would not be appropriate on a motion to dismiss, it is appropriate herein on summary judgment.

1) Was Dr. Winchell an Agent for the State Defendants?

Courts which have considered the agency question in the context of Fourth Amendment violations focus on two issues: 1) the extent of the involvement of the government, and 2) the purpose or purposes of the private citizen in conducting the search. See, e.g., United States v. Ford, ___F.2d___, No. 84-5982 (11th Cir., July 16, 1985); United States v. Howard, 752 F.2d 220, 227 (6th Cir. 1985); United States v. Bennett, 729 F.2d 923, 924 (2d Cir.), cert. denied, 105 S.Ct. 572 (1984); United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982); United States v.

Jennings, 653 F.2d 107, 110-11 (4th Cir. 1981).

From the record before this court, the extent of government involvement in obtaining Deer Park Medicaid records appears minimal, if not non-existent. Even if the state defendants requested Dr. Winchell to bring Medicaid records with her to the February 27, 1980, meeting, those records obviously were in her possession before the alleged illegal search and seizure. She obtained them in prior discovery in her state civil suit conducted long before she contacted the Medicaid Fraud Control Unit. There is no allegation or any evidence in the record that Dr. Winchell, at the behest of the state defendants, went to Deer Park Medical Center anytime between February 21, 1980 -- when she first spoke to Mr. Tartaglino -- and February 27, 1980 -- when she met with Mr. Kelberman -- to obtain Medicaid records for them.

Furthermore, Dr. Winchell stated under oath in her deposition that after the February 27, 1980, meeting she provided no further Medicaid documents to the state defendants.

Assuming for the moment that state involvement were present in this case, courts also look at the purpose the private citizen had to conduct the search. In the Ninth Circuit, a line of cases holds that if the only purpose of a private search is to further a government interest, it is subject to Fourth Amendment strictures. See, e.g., United States v. Walther, 652 F.2d 788, 791-93 (9th Cir. 1981); United States v. Krell, 388 F. Supp. 1372, 1374 (D. Alaska 1975). When, however, a dual purpose for the search exists such that the private person is also furthering his own ends, the search generally retains its private character. See, e.g., United States v. Miller, 688 F.2d at 657-58;

; United States v. Jennings, 653 F.2d at 110-11; United States v. Cova, 585 F. Supp. at 1194-95.

As stated previously, Dr. Winchell alleged in her state civil suit that Deer Park and Dr. Hooper had committed Medicaid fraud. Any discovery conducted prior to her February meeting with the state defendants had only one purpose -- to prove those allegations.

That purpose, however, was not diminished by her meeting with the state defendants. When she conducted further discovery on March 10, 1980, it must logically be assumed that she did so to gain further proof of Medicaid fraud for her own benefit. If in doing so she also obtained information beneficial to the Medicaid Fraud Control Unit and turned it over to them (and there is no indication in the record that she did so), that dual purpose does not eradicate the private nature of her search.

Based on the facts before the court, summary judgment for the defendants would be appropriate on the agency issue. Because the court, without specific notice to the parties, has treated the motions as ones for summary judgment and because discovery as to the state defendants has been stayed pending resolution of the immunity issue,2/ this court will provide the plaintiffs with an opportunity to controvert those apparent facts, however, admissible in evidence.3/

Sufficient evidence must be produced tending to show 1) that the state defendants

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2/ The immunity issue, as discussed infra, remains a live issue in this case.

3/ In the Fourth Circuit, some notice to the parties that motions to dismiss will be treated as motions for summary judgment is required. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). In this case, all parties have supplemented the record beyond the pleadings. In an abundance of caution, however, because the facts are so crucial to the agency inquiry, the plaintiffs will have an additional opportunity to respond.

directed Dr. Winchell to obtain records for them on March 10, 1980; 2) that Dr. Winchell did so and turned records over to the state defendants after the March 10 "search"; 3) that those records were different from the ones she turned over to the state defendants on February 27, 1980; 4) that Dr. Winchell would not have conducted further discovery on March 10, 1980, but for the direction of the state defendants that she gather evidence for them.

The additional opportunity to provide sufficient evidence to controvert the facts present in the record is not to be viewed as a license for broad, sweeping discovery requests. The issue here is a narrow one and discovery must remain focused thereon. To that end, the discovery stay as to the state defendants is lifted.

2) Was There a Legitimate Expectation of Privacy in the Documents Seized?

The state defendants argue that under the "required records" doctrine Dr. Hooper

had no legitimate expectation of privacy in the Medicaid documents allegedly seized by Dr. Winchell. Under the required records doctrine, "records required to be kept pursuant to valid regulatory programs have a 'public aspect' for purposes of constitutional analysis, and thus are not private papers entitled to the protection of the fourth or fifth amendments." Donovan v. Mehlenbacher, 652 F.2d 228, 231 (2d Cir. 1981), citing, inter alia, Shapiro v. United States, 335 U.S. 1, 32-36 (1948).

It well may be true, as the state defendants argue, that Dr. Hooper chose to engage in the regulated business of medicine, see Md. Health Occupations Code Ann. Section 14-101 et seq.; and that Dr. Hooper and his medical group voluntarily agreed to participate in the State's Medical Assistance Program, COMAR, Medical Care Programs, Physician's Services, Section 10.09.02; and that under the regulations governing the

Medical Assistance Program, Dr. Hooper agreed "to maintain adequate records for a minimum of five (5) years ...." COMAR Section 10.09.02.03(d). And it may be true that as a result those records have taken on public aspects which bring them within the required records doctrine.

The required records exception, however, does not grant the state a license to conduct an illegal search and seizure as has been alleged herein. The regulations governing inspection of the records kept by Dr. Hooper state that they are to be made "available, upon request, to the Department [of Health and Mental Hygiene] or its designee." COMAR Section 10.09.02.03(D).

Most regulatory acts allowing warrantless inspections of records require that some type of subpoena be issued for the documents. See, e.g., In Re Kenny, 715 F.2d 51, 52-53 (2d Cir. 1983) (discussing "required records" doctrine as it relates to

medical records -- records were subpoenaed); United States v. McCoy, 492 F. Supp. 540, 543-44 (M.D. Fla. 1980) (discussing subpoena of customshouse broker's records and the required records doctrine). Even the required records doctrine does not purport to allow unreasonable inspections. The regulations governing inspection herein require that the records be available upon request.

Under the facts as alleged, no request was made, and if such a request were made by Dr. Winchell she would have been acting as an agent of the state -- a position the state defendants argue against.

In summary, although the records at issue here may have been required records, that doctrine cannot obviate the Fourth Amendment claim made herein.

3) Role of Stoppleman and Rosen

The amended complaint alleges that Dr. Winchell's "search and seizure" of Medicaid

records on March 10, 1980 was "performed with the knowledge, advice, consent, and direction of defendants Stoppleman and Rosen and S & R, acting in concert with defendants Winchell, Sachs, Kelberman, Tartaglino, and/or Rose." (Paper 124, Paragraph 23).

A "party charged with the [constitutional] deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

Although the allegation connecting these defendants with the state defendants is a bit threadbare and the link between them tenuous, this court cannot state at this time that the plaintiffs would in no way be able to prove a claim against them. Therefore, dismissal, at

this stage of the litigation, would be inappropriate. See Conley v. Gibson, 355 U.S. 42 (1957).

B. Immunity Issue

Two types of immunity from Section 1983 suits may be extended to prosecutors and their agents. The first, absolute immunity, extends to prosecutors in "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 431 (1976). The second, qualified immunity, is applicable "insofar as [the challenged] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Turning first to the issue of qualified immunity, it is clear that the facts of this case, as they now stand before this court, show that no constitutional right has been violated. The plaintiffs, however, have been provided an opportunity to come forward with

proof that Dr. Winchell was an agent of the state defendants. If such proof is forthcoming and if it establishes that the state defendants used Dr. Winchell to obtain evidence in an illegal manner, the doctrine of qualified immunity will not apply. The right to be free of illegal searches and seizures by private citizens acting as agents of the state is a clearly established one.

The issue of absolute immunity is not so easily resolved. "[A] prosecutor enjoys absolute immunity from Section 1983 suits for damages when he acts within the scope of his prosecutorial duties." Imbler v. Pachtman, 424 U.S. at 420. Imbler held that a prosecutor was acting within the scope of his prosecutorial duties when "initiating a prosecution and presenting the State's case...." Id. at 431.

The Court, however, had "no occasion to consider whether like or similar reasons require immunity for those aspects of the

prosecutor's responsibility that cast him in the role of administrator or investigative officer rather than advocate." Id. at 430-31. The Court recognized that "[d]rawing a proper line between [those] functions may present difficult questions." Id. at 431 n.33.

That such a line drawing is a most difficult question is demonstrated by the variety of tests, factors, and criteria used by various circuits to determine whether a particular action of a prosecutor is advocacy, investigative or administrative. See generally Note, Supplementing the Functional Test of Prosecutorial Immunity, 34 Stan.L.Rev. 487 (1982) (identifying the strict functional test; the "Imbler umbrella" test of the Fifth Circuit; the "harm" test of the Second Circuit; the "general features" test of the Third Circuit; and recommending a test which combines several of those approaches). See also Gray v. Bell, 712 F.2d

490 (D.C. Cir.), cert. denied, 104 S.Ct. 1593 (1983) (adopting a two-step analysis focusing on type of conduct and available deterrents).

The dividing line between absolute immunity and qualified immunity rests on the answer to the question: "Is the challenged conduct 'quasi-judicial' conduct?" Justice Powell, writing for the Court in Imbler, remarked, "It is the functional comparability of [a prosecutor's] judgments to those of a judge that has resulted in ... prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." Imbler, 424 U.S. at 423 n.20. Thus, Imbler called for a functional analysis of the conduct in question.

Some prosecutorial conduct, because it is so closely connected to the judicial process, can be labeled easily as quasi-judicial. See Annot., 67 ALR Fed. 640, 748-49 (1984) (describing pre-trial, trial, and

post-trial prosecutorial conduct courts have protected by the bar of prosecutorial immunity). For example, conduct in connection with grand jury proceedings, arrest, indictment, and plea bargaining is considered so closely related to the initiation and presentation of a criminal prosecution that courts routinely apply the doctrine of absolute immunity to bar civil rights actions based on prosecutorial conduct in those areas, no matter how outrageous that conduct may have been. See id. at 658-70 (citing cases).

When the challenged conduct involves searches and/or seizures, however, courts often categorize the activity as investigative and deny the application of absolute immunity, applying instead the doctrine of qualified immunity. See, e.g., Fullman v. Graddick, 739 F.2d 553, 558 (11th Cir. 1984); McSurely v. McClellan, 697 F.2d 309, 319-20 (D.C. Cir. 1982); Taylor v.

Kavanagh, 640 F.2d 450, 452-53 (2d Cir. 1981) (dicta); Marrero v. City of Hialeah, 625 F.2d 499, 505-506 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Hampton v. Hanrahan, 600 F.2d 600, 632-33 (7th Cir.), cert. denied, 446 U.S. 754, 759 (1979) (per curiam); see also Pembaur v. City of Cincinnati, 746 F.2d 337, 339 (6th Cir. 1984) (discussing only good faith immunity defense in illegal search and seizure Section 1983 case); Note, supra, 34 Stan.L.Rev. at 491 n.19 (citing cases from the 9th and 3rd Circuits before and after Imbler which have held "that investigative activity is essentially police work, and that prosecutors performing an investigative function should therefore receive the same immunity (qualified) afforded law enforcement officers.").

Investigative conduct of all types often has been categorized as non-quasi-judicial because of its similarity to police functions rather than judge-like functions. See, e.g.,

Rex v. Teeples, 753 F.2d 840, 843-44 (10th Cir. 1985) (participating in interrogation of suspect is police-related work not entitled to absolute immunity); Weathers v. Ebert, 505 F.2d 514, 517 (4th Cir. 1974), cert. denied, 424 U.S. 975 (1976) (prosecutor's making an arrest is a police function; no absolute immunity).

If the task before this court were merely to label the conduct involved herein, assuming that the conduct constituted an illegal search and seizure, there can be no question that the activity engaged in was investigative. This court recognizes, however, that since the decision in Imbler, some circuits have gone beyond a mere labeling exercise and have tried to determine when investigative conduct should be considered quasi-judicial. To understand why and how they have done so, the goals and rationale supporting absolute prosecutorial immunity must also be understood.

1) Reasons for Absolute Prosecutorial Immunity

Imbler identified at least four main reasons for granting prosecutors absolute immunity. First, the Court wished to protect a prosecutor's ability to exercise his discretion for the benefit of the public he is required to serve vigorously. "[H]arassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties." 424 U.S. at 423.

Second, the Court recognized the heavy burden that defending a civil rights suit, even under a qualified immunity standard, would impose on a prosecutor. The Court reasoned that "[f]requently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." Id. at 425. Defending innumerable civil suits, in all likelihood, "would require a virtual

retrial of the criminal offense in a new forum ...." Id.

Third, the Court expressed concern that a prosecutor in a close case might elect not to proceed to trial for fear that if he lost the case Section 1983 liability would be triggered. "If prosecutors are hampered in exercising their judgment ... by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." Id. at 426.

Finally, the Court looked at the possibility that when a lower court reviews the ultimate fairness of a trial it could be reluctant to decide in favor of the accused if such a finding could lead to a Section 1983 action. The decision regarding whether there had been a fair trial under the law "should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to

respond in damages for his error of mistaken judgment." Id at 427.

Several years after Imbler, the Court again reviewed the rationale supporting absolute immunity and again emphasized the need to give prosecutors wide discretion in decisionmaking without fear of retaliatory suits. Butz v. Economou, 438 U.S. 478, 515 (1978). Protecting such decisionmaking, the Court determined, also enhanced the fairness of the judicial proceedings assuring to the extent possible the presentation of all relevant evidence. Id. at 517.

Both Imbler and Butz view absolute prosecutorial immunity as a safeguard to the criminal justice system. Safeguards within that system, such as judge-imposed sanctions, cross-examination and rebuttal, and the penalty for perjury, also militate in favor of absolute immunity for prosecutors acting in a quasi-judicial capacity. See Butz, 438 U.S. at 515-17; Imbler, 424 U.S. at 429.

If absolute immunity applies when a prosecutor is engaged in investigative activities, such application must rest on the Imbler/Butz rationale.

2) How Other Circuits Have Approached the Problem

Drawing the line between quasi-judicial and non-quasi-judicial conduct, as stated previously, is a difficult task. The courts of appeal which have addressed the issue have developed several different types of tests to facilitate the line drawing.4/

4/ In the Fourth Circuit there are no cases which analyze in depth the issue of when investigative conduct might be considered quasi-judicial.

Before the Supreme Court decided Imbler, however, the Fourth Circuit in 1974 recognized that "a number of courts have held that prosecuting attorneys are immune from civil suits for damages based on the performance of duties that are part of the judicial process." Weathers v. Ebert, supra, 505 F.2d at 525. Weathers also recognized that when a prosecutor functions like a policeman, absolute immunity does not apply. Id. at 517.

Two years later, the court relied on Weathers to hold a prosecutor absolutely "immune from any civil action connected with his prosecuting function." Kipps v. Ewell, [continued next page]

4/ [continued] 538 F.2d 564, 566 (4th Cir. 1976). In Kipps, the prosecutor allegedly had advised the police during the pre-arrest investigation. The court avoided any decision on whether such investigative conduct would be entitled to absolute immunity "since the defense of probable cause and good faith would protect [the prosecutor] in this case even if he were to be judged by standards for police rather than prosecutorial conduct." Id. at 566.

Judge Hamilton, in Cribb v. Pelham, 552 F. Supp. 1217, 1221-23 (D.S.C. 1982), looked to the function of the prosecutor's activities to determine that his decision to docket a case was an act of advocacy, not one of administration. Id. at 1222. Although that case did not address the advocacy/investigative dichotomy, it demonstrates the functional analysis approach and adopts the "harm test," discussed infra, of the 2nd Circuit. Id. at 1223.

In Waller v. Butkovich, 584 F.Supp. 909 (M.D.N.C. 1984), Judge Merhige briefly alluded to an FBI agent defendant engaged in an investigation following the Greensboro, North Carolina Klu Klux Klan attack during an anti-Klu rally. Judge Merhige stated, "It is arguable that such investigative work would be protected by absolute prosecutorial immunity." Id. at 929 (citing Ross v. Reed, 719 F.2d 689, 694-95 n.5 (4th Cir. 1983); Segarra v. McDade, 706 F.2d 1301 (4th Cir. 1983). Neither of those Fourth Circuit cases directly addressed the investigative v. advocacy issue and both concern prison officials as defendants. Judge Merhige did not decide the issue, finding instead that the complaint failed to state a claim against the investigating agent. Id. at 930.

In Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981), the Second Circuit adopted a test which refers "to the type of harm suffered from the alleged misconduct ...." Id. at 453. The court concluded that "if as a result of prosecutorial misconduct a defendant is compelled to face prosecution, or to suffer imprisonment or pretrial detention, the harm cannot be redressed via a Section 1983 civil rights suit. But, where the alleged harm is inflicted independently from the prosecution, for example, ... the violation of Fourth Amendment privacy rights resulting from a prosecutor's authorization of an illegal search -- the prosecutor cannot rely on the blanket protection of absolute immunity." Id. at 453 (citations omitted) (The Fourth Amendment example, however, is dicta. The case involved a plea bargaining issue). Thus, it appears, that the Second Circuit classifies investigative type conduct as non-quasi-judicial, because such conduct

is "not directly related to the delicate judgments prosecutors must make concerning the development of the Government's case." Id. at 452.

The Fifth Circuit has adopted the "Imbler umbrella" test. See Marrero v. City of Hialeah, 625 F.2d 499, 505 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981). In Marrero, the prosecutor allegedly had participated in an illegal search and seizure and allegedly slandered the plaintiffs. The court stated, "[the] participation in the allegedly illegal search and seizure occurred not only outside the courtroom but prior to the initiation of any judicial proceedings against appellants. Although some activities which a prosecutor undertakes prior to indictment may be classified as quasi-judicial ... a prosecutor who assists, directs, or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in

his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and ... conducting them in court." Id. at 505 (ellipsis in original) (citing to Imbler, 424 U.S. at 424).

The court concluded that such investigative activity did not fall "within the sphere of activity for which prosecutors are given absolute immunity in Imbler." Id. at 507.

That conclusion, however, did not end the inquiry. Imbler left open the question of when investigative activity would be covered by absolute immunity. Thus the Fifth Circuit went on to review the rationale set out in Imbler and Butz for absolute immunity and concluded that even the fear of retaliatory lawsuits, the chilling effect on a prosecutor's decisionmaking, and the need to protect the criminal justice system did not militate in favor of granting absolute immunity. Id. at 507-08. The court stated,

"[w]hen a prosecutor makes an investigative decision, such as whether to conduct a search or seizure, he is making a decision essentially comparable to that of a policeman. With respect to such decisions, the Supreme Court has determined that a qualified immunity adequately preserves the official's ability to function." Id. at 508.

Marrero recognized that "imposition of liability upon a prosecutor for participating in an illegal search and seizure could interfere with the prosecutor's performance of his quasi-judicial duties .... However, at least two considerations militate against extension of absolute immunity to such investigative conduct. First, ... the nexus between the judicial process and the decision to search is sufficiently attenuated that extension of absolute immunity to such a decision is not justified .... [E]xtension of absolute immunity to a decision to engage in a search and seizure on the ground that

protection of that decision would further protect his decisions at trial could serve as carte blanche for prosecutorial abuse without any certainty of a counter-balancing benefit to the judicial process. Second, ... the safeguards inherent in the judicial system do not accompany a prosecutor when he engages in investigating conduct .... Unlike prosecurotiral misconduct which occurs within the confines of the judicial process, unconstitutional conduct which occurs outside that process may never be subject to judicial scrutiny unless individuals are allowed to bring private actions." Id. at 508 n.12.

Thus, Marrero establishes that if the challenged conduct does not fall under the Imbler umbrella, it will be protected by absolute immunity only if the Imbler/Butz policy reasons require such protection. Pre-indictment searches and seizures, Marrero concluded, do not merit absolute immunity.

The Third Circuit has tried a variety of approaches, but illustrative is that in Forsyth v. Kleindienst, 599 F.2d 1202 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981). The court stated: "[T]he decision of ... a prosecuting attorney to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would foster uninformed decisionmaking and the potential for needless actions .... [T]he right to make the decision without being subject to suit must include some limited right to gather necessary information. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all

of a prosecutor's investigative activities. We hold only that to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded the decision itself." 599 F.2d at 1215.

Forsyth recognized that the application of its holding would require a limited factual inquiry on the issue of absolute immunity. Id. In the Third Circuit, the district courts appear to conduct such an inquiry "to examine whether the information seized was to be used in deciding whether or not to prosecute -- and not merely to gather evidence in support of a prosecution already decided upon. To this end, Forsyth contemplates that the information seized must be 'necessary to [the] decision to initiate a criminal prosecution' ... in order for immunity to exist, and not information additional to that which would already

support a prosecution." Klitzman, Klitzman & Gallagher v. Krut, 591 F. Supp. 258, 265 (E.D. Pa.), affirmed on other grounds, 744 F.2d 955 (3d Cir. 1984). See also Mancini v. Lester, 630 F.2d 990, 993-94 (3d Cir. 1980); Hawk v. Brosha, 590 F. Supp. 337, 344 (E.D. Pa. 1984).

The Court of Appeals for the District of Columbia in Gray v. Bell, supra, 712 F.2d 490 (D.C. Cir. 1983), describes another approach to determine when investigative conduct should be considered quasi-judicial.

In Gray, Judge Edwards, writing for the court, surveyed the literature and the case law which developed after Imbler. He defined the purpose of absolute immunity for prosecutors -- to allow prosecutors to make decisions regarding the initiation and conduct of criminal cases without fear of retaliating lawsuits. Id. at 497-98. With that purpose in mind, "[t]he controlling question ... is whether the conduct in

question is so closely associated with the judicial process that it can be characterized as advocatory." Id. at 499.

Gray sets forth a two-step test to determine whether the prosecutor's conduct at issue is part of his quasi-judicial role. First, the court should "look ... to whether [the conduct] was sufficiently adversarial to evoke strong resentment and thus frequent retaliatory litigation." Id. at 500. At this first level of analysis, "the phase of the proceedings at which the conduct occurs" provides the starting point. Id. (emphasis in original). If the conduct occurred during the post-indictment phase, "[t]he prosecutor is far more likely to be the target of vindictive hositility," and the conduct is more likely to be advocatory. Id.

Pre-indictment conduct, however, may also be advocatory. Judge Edwards set forth a non-exhaustive list of "clues that may indicate whether the prosecutor's role at

pre-indictment stages approximates his position after an indictment has been returned." Id. Judge Edwards recommended that courts examine the "particularity of the proceedings," id. at 500-01 (emphasis in original), i.e., whether the investigative conduct was focused on a specific target or was more generalized. A more focused investigation "may cast a shadow of public suspicion and thus evoke vindictive reactions no less intense than could be expected from an indicted defendant." Id. at 501.

The court also stated that the "context of the conduct," i.e., whether the prosecutor had taken an "adversarial posture," and the "nature of particular prosecutorial actions or decisions" were clues to whether the conduct was quasi-judicial. Id.

At the second stage of the Gray analysis, the court recommended an inquiry "[i]nto whether there [are] prosecutorial safeguards to minimize the necessity for

civil damage suits." Id. Judge Edwards recognized that post-indictment prosecutorial conduct is subject to close judicial scrutiny, but the pre-indictment conduct is subject generally to little judicial monitoring. He noted that "investigatory conduct may be subject to the exclusionary sanction at trial or to professional discipline. But these are often hollow and ineffective remedies." Id. He recommended that "[a]s the relationship between pre-indictment activity and the judicial process becomes more attenuated, the more important it becomes to take into account the adequacy of the available sanctions to deter abuse." Id. at 501.

Both Gray and Forsyth recognize that utilizing the analyses they recommend may require a limited factual inquiry to decide whether absolute immunity applies in a given case. See Forsyth, 599 F.2d at 1215; Gray, 712 F.2d at 496. As such, granting a motion to

dismiss based on an absolute immunity defense would be precluded in such circumstances.

In summary, the decisions discussed herein show two different approaches to the problem. The Fifth and the Second Circuits conduct little or no factual inquiry, label the conduct investigative, analyze the reasons for absolute immunity, and hold that such immunity does not extend to search and seizure conduct when that conduct occurs prior to indictment.

The Third and the District of Columbia Circuits envision a limited factual inquiry into the type of conduct and to some extent the reasons for it.

3) Test to be Applied

It is the opinion of this court that decision line-drawing is necessary in this area of the law. Specifically, prosecutors must know the boundaries of absolute immunity in order to function effectively and with confidence.

In addition, the bar of absolute immunity should be just that -- an absolute bar to suit. The issue should be one capable of resolution on a motion to dismiss. The factual inquiry which the Third Circuit established, for example, focuses on the necessity of the information seized to the decision to prosecute. A district court utilizing that analysis may have to review all the evidence gathered prior to an indictment to determine whether the information gleaned from the search and seizure met the necessity test -- a nebulous test at best, and one subject to much second-guessing.

Further, the issue of absolute immunity should be capable of resolution prior to extensive discovery of prosecution records in a given case. See Harlow v. Fitzgerald, 457 U.S. 800, 816-18 (1982) (recognizing the disruptive effect on effective government occasioned by broad ranging discovery). If a

clear line between "protected" and "unprotected" conduct is not drawn, discovery of specific facts must be allowed. Particularly in cases in which feelings run high, such as the case at bar, that type of discovery easily could become the subject of long and bitter disputes creating additional burdens for prosecutors.

Therefore, in the opinion of this court, the choices are either that all pre-indictment search and seizure conduct is protected by absolute immunity or it is not.

After considering the cases cited above, this court concludes that the Fifth Circuit's decision in Marrero is most persuasive. That opinion draws the line most decisively by concluding that pre-indictment search and seizures are not protected by absolute immunity.

In the case at bar, the plaintiffs allege that prior to March 10, 1980, Dr. Winchell met with the state defendants and at that

meeting they directed her to obtain for them evidence of Medicaid fraud from the records at Deer Park Medical Center, that on March 10, 1980, Dr. Winchell, acting as an agent for the state, obtained the records, turned them over to the state defendants and, in essence, did for the state an act which the state defendants could not have done legally at that time. Such conduct is similar to police-type conduct. It occurred at the initial stage of investigation, months before an indictment was brought.

This court agrees with Marrero that the decision to conduct a search, particularly the type of search allegedly conducted in the case at bar, is too far removed from the judicial process to merit the protection of absolute immunity. Judicial scrutiny and judicial deterrents are not available to protect persons subject to such conduct, when that conduct occurs.

Of course, the exclusionary rule is available, but that safeguard can be invoked only if an indictment is brought. To conclude, based on the availability of the exclusionary rule, that a deterrent to prosecutorial misconduct at the investigative level exists sufficient to raise the bar of absolute immunity would create two classes of plaintiffs -- one who, because he was indicted, could not bring suit under Section 1983 for alleged Fourth Amendment violations and one who could bring suit because no indictment followed the investigation. Such a dichotomy is an untenable solution to the problem.

For all those reasons, and for the reasons stated in Marrero, this court declines to extend the doctrine of absolute immunity to cover pre-indictment searches and seizures like the one alleged herein.

C. Relation Back of the Amended Complaint

The defendants contend also that the

Fourth Amendment claim set forth in the amended complaint does not relate back to the original complaint and that it is barred by the relevant statute of limitations.

Under Fed. R. Civ. P. 15(c):

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

In determining whether a claim relates back, courts will look to the "operational facts" set forth or attempted to be set forth in the original complaint, see Goodman v. Poland, 395 F. Supp. 660, 684 (D. Md. 1975), to determine whether the original complaint gave the defendants notice regarding the claim or defense asserted in the amended pleading. See, id.; Schoonfield v. Mayor and City Council of Baltimore, 399 F. Supp. 1068, 1090 (D. Md. 1975), aff'd, 544 F.2d 515 (4th Cir. 1975); 6 C. Wright & A. Miller, Federal

Practice and Procedure Section 1497 at 495 (1971).

An amended complaint will not relate back, however, if it states an entirely new cause of action based on facts different from the facts alleged in the original complaint. See, e.g., Howard v. McCrory, 601 F.2d 133, 136 (4th Cir. 1979); Griggs v. Farmer, 430 F.2d 638, 639 (4th Cir. 1970); 3 Moore's Federal Practice Paragraph 15.15[2] at 15-196. Although "[t]he Federal Rules have broadened the concept of 'cause of action' shifting the emphasis from a theory of law as to the cause of action, to specific conduct of the defendant upon which the plaintiff relies to enforce his claim," 3 Moore's Federal Practice Paragraph 15.15[2] at 15-198, there must be a factual nexus between the original and the amended complaint. See Grattan v. Burnett, 710 F.2d 160, 163 (4th Cir. 1983), affirmed on other grounds, sub

nom., Burnett v. Grattan, ___U.S.___, 52 U.S.L.W. 4916 (June 27, 1984).

The plaintiffs alleged in the original complaint that the defendants denied plaintiff Hooper his "civil rights to be free of malicious prosecution, abuse of process, false arrest, trespass, ultra vires prosecution, vindictive prosecution, invasion of privacy and unwarranted publicity ...." (Paper 1, Paragraph 12). In effect, the major focus of the original complaint was the allegedly unlawful prosecution of the plaintiff Hooper.

The amended complaint, to the extent amendment was allowed, alleges an unlawful search and seizure which occurred prior to the prosecution. The amendment presents a new cause of action different from the ones presented in the original complaint.

Even a new cause of action may relate back if the defendants' conduct, relied on to support the original complaint, is factually

similar to the defendants' conduct relied on to support the amended complaint. A comparison of the original and amended complaints, to determine if such a factual nexus exists, is therefore necessary.

1) Facts Alleged in the Original Complaint

The plaintiffs alleged in the original complaint that defendant Winchell, who was a shareholder and a physician/member of the Deer Park Medical Group, "furnished false Criminal Information to the other defendants and/or other persons, and said defendants failed to exercise ordinary and reasonable care to determine the accuracy of [the] Criminal Information." (Paper 1, Paragraph 11).

Based on "alleged documents, false allegations, misrepresentations, and incomplete documentary materials furnished by defendant Winchell to defendants Sachs, Kelberman, Rose, and Tartaglino," a criminal information was filed against Hooper for

Medicaid fraud (Paper 1, Paragraphs 16 & 18). The case was tried from April 26, 1982 to May 3, 1982 and at the close of the State's case, it "was ~~determined~~ dismissed by the court for failure of proof." (Paper 1, Paragraph 22).

The original complaint also alleges that the state defendants negligently supervised an investigation of the plaintiff (Paper 1, Paragraph 20).

2) Facts Alleged in the Amended Complaint

The plaintiffs allege in their amended complaint that "[i]n late February, 1980 defendant Winchell conferred by telephone and met personally with defendants Sachs, Kelberman, Tartaglino and/or Rose in Baltimore, Maryland. Thereafter on or about March 10, 1980, defendant Winchell, at the direction of ... [said] defendants ... entered the premises of Deer Park for the purpose of examining and seizing records of Deer Park for ... said defendants .... At said time, defendant Winchell was acting

under color of an order permitting discovery in a Maryland civil case involving Hooper and Deer Park .... [T]here existed no subpoena for such records .... All the foregoing actions of defendant Winchell were performed with the knowledge ... and direction of defendants Stoppleman, Rosen, and S & R ...." (Paper 124, Paragraph 23).

If a factual nexus exists between the original and amended complaints, the nexus occurs in the factual allegation in the original complaint that Winchell furnished information to the state defendnts, i.e., Medicaid records of Hooper and Deer Park. Even assuming that some factual nexus exists between the original and amended complaints, the original complaint must put the defendant on notice regarding the claim asserted in the amended pleading.

The plaintiffs point to several parts of the original complaint which they assert put

the defendants on notice that a Fourth Amendment violation was a possible claim:

1. "[D]efendant Sachs is sued ... for wrongful acts done outside his prosecutorial functions and done in his investigatory and/or administrative capacities" (Paper 1, Paragraph 7).

2. An identical allegation is contained as to defendant Kelberman in paragraph 8 or the original complaint.

3. Paragraphs 9 and 10 of the original complaint allege that Rose and Tartaglino are "investigator[s] employed by ... the Medicaid Fraud Control Unit."

4. "Defendant Winchell ... conspired with other defendants ... in such a manner as to subject, or cause, plaintiff to be denied civil rights within the meaning of 42 U.S.C. 1983" (Paper 1, Paragraph 11).

5. "Defendants by their acts, individually, and by conspiring together with each other ... have, inter alia, denied plaintiff Hooper his civil rights...to be free of...trespass, ... invasion of privacy, and unwarranted publicity caused by the acts of the defendants and instigated by the defendants" (Paper 1, Paragraph 12).

6. "[D]efendants have interferred with the rights of plaintiff Deer Park to conduct lawful business" (Paper 1, Paragraph 13).

> The State defendants acted on "'facts' (alleged documents, false allegations, misrepresentations, and incomplete documentary material) furnished by defendant Winchell to defendants Sachs, Kelberman, Rose, and Tartaglino" (Paper 1, Paragraph 18).

7. "The false 'facts' provided to defendants Sachs, Kelberman, Rose, and Tartaglino by defendant Winchell were furnished by defendant Winchell maliciously and with intent to injure plaintiff" (Paper 1, Paragraph 19).

8. "[T]he investigation of plaintiff ... was the result of the negligence of defendants Sachs, Kelberman, Rose and/or Targalino in that said persons failed to use reasonable case in the selection and supervision of their subordinates and/or said persons carelessly and/or negligently conducted, and/or caused to be conducted, the proceedings in question" (Paper 1, Paragraph 20).

The plaintiffs apparently argue that the broad language of the original complaint referring to wrongful acts, a conspiracy, and a negligent investigation indicate that an illegal search and seizure occurred. In addition, they seem to imply that, because trespass and invasion of privacy are mentioned in the complaint, notice was given

of the Fourth Amendment claim. That general language, even coupled with the allegation that a private citizen furnished information to the State which allegedly formed the basis for the State's prosecution of Hooper, does not presage an illegal search and seizure claim.

After comparing the allegations in the amended complaint with the allegations in the original complaint, the court concludes that there is insufficient nexus between the facts in each complaint to have given the defendants notice of a possible claim of Fourth Amendment violation.

D. Statute of Limitations

It is undisputed that the alleged illegal search and seizure occurred on or about March 10, 1980 (see Paper 104 at 9; Paper 107 at 10). All defendants argue that the Fourth Amendment claim arose on that date. Therefore, the state defendants and Dr. Winchell assert that when the first amended

complaint was filed on September 8, 1983, it was time barred. Defendants Stoppleman and Rosen similarly argue that when they were added as defendants in the second amended complaint on April 3, 1985, the statute of limitations had run on the claim against them.5/

5/ No argument has been made by the plaintiffs that the second amended complaint should relate back to the first amended complaint. Under Fed. R. Civ. P. 15(c):

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

It is unlikely, given the requirements of Rule 15(c), that the second amended complaint would relate back to the first amended complaint.

The plaintiffs argue, however, that although they knew that Dr. Winchell had conducted discovery on March 10, 1980, it was not until Dr. Hooper's criminal trial in late April to early May, 1982 that the records Dr. Winchell obtained were introduced as evidence against Dr. Hooper by the State. Further, the plaintiffs assert that even that knowledge did not alert them to a possible Fourth Amendment violation. They argue that it was not until April 27, 1983, when Dr. Winchell was deposed, that they gained "proof of her relationship with the state defendants...." (Paper 104 at 9).

There is no federal statute of limitations applicable to suits arising under Section 1983. Therefore, federal courts borrow the applicable state statute of limitations. Board of Regents v. Tomanio, 446 U.S. 478, 484 (1980); Bireline v. Seagondollar, 567 F.2d 260, 262 (4th Cir. 1977), cert. denied, 444 U.S. 842 (1979).

The applicable statute for actions brought under 42 U.S.C. Section 1983 in Maryland normally is the three-year statute of limitations set forth in Md. Cts. & Jud. Proc. Code Ann. Section 5-101 (1984). Burnett v. Grattan, ___U.S.___, 52 U.S.L.W. at 4917-18; Lewis v. Clark, 534 F. Supp. 714, 716 (D. Md. 1982).

"Although the time for bringing the action is borrowed from state law, federal law determines the time of accrual of the action. Under the federal rule, the time of accrual is that point in time when the plaintiff knows or has reason to know of the injury which is the basis of the action." Lewis v. Clerk, 534 F. Supp. at 716 (citations omitted). "It is the awareness of the facts giving rise to the course of action and not the awareness that the illegality of the action is conclusively provable that begins the running of the statute of limitations." Id. at 716-17.

The record reveals that the earliest possible date on which the plaintiff knew or should have known of the facts giving rise to the cause of action is March 10, 1980. On that date, Dr. Winchell, pursuant to the Montgomery County Circuit Court's discovery order, began photocopying documents at Deer Park Medical Center.

In that prior civil case, filed in October, 1978, Dr. Winchell petitioned for involuntary dissolution of the Deer Park Medical Group, sought an injunction pendente lite and an accounting, alleging, inter alia, that Dr. Hooper had filed false and fraudulent claims to Medicaid for reimbursement (Paper 107, Ex. A. Paragraph 10(e)). The case was marked by several protracted discovery disputes (Paper 107, Ex. B, docket entries 60, 63, 77, 89, 90, 108-10, 112-14, 116-17). Dr. Winchell was permitted discovery of Deer Park patient charts in the fall of 1979 (Paper 107, Ex. B, docket entry

102), and discovery of all Medicaid vouchers and patient charts on February 29, 1980 (Paper 107, Ex. B., docket entry 124).

If the plaintiffs knew on March 10, 1980 only that Dr. Winchell had copied Deer Park records and taken them with her, they were not on that date aware of all of the facts giving rise to the Fourth Amendment claim. Something more was needed -- knowledge of the agency of Winchell for the state defendants.6/

The defendants argue that the plaintiffs in fact were aware of the alleged agency of Winchell at that time or shortly thereafter. Specifically, the defendants point to a motion to stay filed on April 7, 1980 by Deer Park Medical Center in the Montgomery County

6/ "Invocation of Fourth Amendment protections requires both an unreasonable intrusion into privacy and a finding of governmental conduct. United States v. Miller, 688 F.2d 652, 656 (9th Cir. 1982); see also Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Torch, 609 F.2d 1088, 1091 (4th Cir. 1979).

Court. In support of that motion, Dr. Hooper averred:

> "2. That on Monday, March 10, 1980 and Wednesday, March 12, 1980, Cheryl Winchell, herself, the plaintiff in this cause, pursuant to discovery ordered in this case, examined many Medicaid vouchers and corresponding patient charts of Deer Park Medical Group, P.A., a professional service corporation organized and existing under the laws of the State of Maryland, for which the plaintiff was employed prior to this action; and in which she is a stockholder. It is to be noted that she spent a considerable amount of time in the task.
>
> 3. That during the week ending March 28, 1980 I was personally served with a summons duces tecum by the Office of the Attorney General to produce and permit the inspection of various records and documents of the aforesaid corporation. A copy of said summons duces tecum is attached hereto and made a part hereof entitled 'Exhibit A.'
>
> 4. That while it is my sincere belief and expectation that the result of such investigation will be complete exoneration, I have been advised that it is entirely possible that testimony may be requested of me, and that with respect to such testimony in that cause, and in the instant case, it is entirely possible that I might wish to avail myself of certain Constitutional rights, among them, the privilege against self-incrimination under the Constitution of the United States.

> 5. With vital corporate records necessary to defend this case in the hands of the Attorney General; and with the danger that testimony by me in depositions and at trial in this cause may possibly be detrimental to my rights in the criminal matter; I therefore sincerely belief [sic] and accordingly state that I do not feel I can receive a fair trial in this matter pending the outcome of the investigation of the Attorney General."

(See Paper 107, Ex. C).

In addition to Dr. Hooper's affidavit, the defendants point to other evidence in the record which allegedly shows that Dr. Hooper knew in March or April of 1980 that Dr. Winchell was going to, or had gone to, the Attorney General's Office with her complaint of Medicaid fraud (see Paper 107 at 12 citing to affidavits and depositions of Hooper and Tartaglino).

The plaintiffs do not dispute those facts, but they do dispute the conclusion of the defendants that such facts were sufficient to alert them to a Fourth Amendment violation.

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In review, it is undisputed that circa March 10, 1980 Dr. Hooper knew that Dr. Winchell had copied and removed Medicaid documents and that before or after that date Dr. Winchell had gone to the Attorney General with a Medicaid fraud complaint. Thus it is not a question of what the plaintiffs knew at that time, but what they reasonably should have known given the facts at their disposal.

Although the facts are not in dispute here, there is a dispute regarding the inferences and conclusions that can be drawn from the facts. When the undisputed facts and inferences that flow from them lead to only one reasonable conclusion, summary judgment on a limitations issue may be appropriate. See, e.g., Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1304 (4th Cir. 1983); see generally Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978) (if inferences point so strongly in one direction that court believes that

reasonable men could arrive at but one verdict, the court may grant summary judgment). "When conflicting inferences can be drawn from the facts, [however], the question of when the [cause of action] should have been discovered must be submitted to the jury." Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975).

It appears to this court that the question of whether the facts known to the plaintiffs in March/April 1980 should have made them aware of a possible Fourth Amendment claim is one for the jury, not the judge.7/ Reasonable men, in the opinion of this court, could draw different conclusions from the facts presented herein regarding

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7/ Although the Maryland statute of limitations sets the time period for this cause of action, federal law governs, not only accrual, but the distribution of functions between judge and jury. See Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 537-39 (1958). As discussed, federal law requires that the limitations issue herein be decided by the jury.

when the plaintiffs should have known of the injury allegedly caused them.

Accordingly, it is this 16th day of September, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendants' motions to dismiss/or for summary judgment are hereby DENIED.

2. That the stay of discovery imposed herein is hereby lifted for the purposes set out in this Memorandum.

3. That the following schedule will govern the final disposition of this case:

Discovery Completion Date	December 16, 1985
Summary Judgment Filing Date	January 6, 1986
Summary Judgment Hearing	February 14, 1986 at 10:30 a.m.
Pre-Trial Conference	March 4, 1986 at 4:30 p.m.

Trial	March 24, 1986 at 10:00 a.m. (9:30 a.m. voir dire)

/s/
James R. Miller, Jr.
United States District Judge

MEMORD3.HOO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER AND DEER PARK MEDICAL GROUP, P.A.	:	
v.	:	NO. M-82-2870 CIVIL
STEPHEN H. SACHS, ET AL	:	

APRIL 18, 1986

ORAL OPINION

The Court: I have read the voluminous record or most of it in this case. My law clerk has been over it with a fine tooth comb. I set out what I consider to be the law fairly thoroughly in the memorandum and order of September the 16th, 1985.

The plaintiffs have been given substantial opportunity for discovery on the points which I consider to be still relevant in the case. There are still some loose ends which I assume will be covered by this affidavit or affidavits, and what I am about to say is subject to receiving those

affidavits and being satisfied that they are accurate and adequate.

It is apparent that there were, to say the least, hard feelings between Dr. Hooper and Dr. Winchell and there was very apparently no love lost between the two and that the feelings were mutual.

Dr. Hooper is of the view that Dr. Winchell was an agent of the state when she went into the offices of Deer Park and obtained files, apparently, on March the 10th and possibly also on March the 12th, 1980.

Incidentally, as far as Rose is concerned, it is my understanding that you concede that there is no evidence.

Mr. Sachsel: Yes. We don't contend that there is any evidence as far as Mr. Rose's involvement.

The Court: All right. As to Mr. Rose, the motion for summary judgment is granted, the plaintiffs conceding that there is

insufficient evidence as to him to support their amended complaint.

As to the remaining defendants, the plaintiffs argue that while there is no direct evidence which they have been able to come up with to satisfy the essential requirements of my memorandum and order of September the 16th, that there is sufficient evidence to justify reasonable inferences that she -- that is, that Dr. Winchell was the agent of the state in doing what she did on March the 10th and March the 12th of 1980 and that she would not have done this but for the importuning or request of the state to -- for her to get them information.

There is no question that summary judgment, where reasonable inferences can be drawn which are conflicting, should not be granted. There is, however, a line between inference piled on ambiguous inference and speculation on the one hand and an inference which reasonably can be drawn to support the

contention of the party opposing summary judgment.

Of course, an inference which can reasonably be drawn should be drawn in favor of the party opposing the motion for summary judgment.

Having said that, it is a lot simpler then to apply the standard. However, I have made a very deliberate effort to do so and have, as I have said, read all of this material or substantially all of it that was relevant; and what I come up with is that this is on the line, the plaintiff's position is on the side of the line in which inference is piled upon vague or ambiguous inference, which the Fourth Circuit has indicated is insufficient to support an opposition to summary judgment.

For instance -- and certainly not intended to be exhaustive, because I would like for the Fourth Circuit to read the entire record and let them reach their own conclusions if they disagree -- a lot is made

of the statement made apparently by Dr. Winchell on or about March the 10th, 1980 that "my job is done" -- or words to this effect -- "my job is done and now the state will take over."

The first step in placing that in the proper context in this motion is to determine what that means, what the witness or what the defendant, Dr. Winchell, was saying.

It requires a leap of faith to me to conclude that she was saying, "I have now completed getting information which I am going to get for the state and am going to give it to them and then they will get whatever else they want" or "they will now sue Dr. Hooper" or "they will now try Dr. Hooper" or whatever they were going to do.

It might just as reasonably be, among many other meanings, that she meant, if she was correctly quoted, which I assume she was for this purpose, "I have now completed my discovery", since, in fact, that is what the

status of the matter was. She had already had discovery in her civil case and she had moved for additional discovery and the court had given her additional discovery and said, "This is it. Go in there these two days and that is it."

Now, it could just as reasonably have been that she was saying, "I have completed my discovery", which, in fact, was the case. She had already seen the state and she figured "the state is going to go after him based on what I am telling them", and there is no question she wanted them to go after him as far as I could see. And she was saying, "and now the state is going to come in and they are going to do their discovery."

Obviously, if she was saying the latter, then there is certainly no inference that can be drawn from that which would be favorable to the plaintiff in this situation. So, you have to, in order to arrive at the inference, based upon the statement which the plaintiff

wants the court to draw or wants the court to find could reasonably be drawn, you have to determine what was meant by the statement, and the statement is so ambiguous that I don't think you can reasonably draw an inference, based upon this ambiguous statement, that would be sufficient to deny summary judgment.

Now, another point is made about the number of documents and when they were given and when they weren't given, and there is a lot of confusion about them, no question. However, it seems to be most of the confusion was created by a reading of this document, which I referred to earlier, which is the February 28th memorandum to the file, which is contained in the plaintiffs' summary judgment opposition exhibits, exhibit number four, where apparently everybody assumed what was being said there was there were ten or 11 patients' charts delivered on that date and they ended up with more than ten or 11

patients' charts. So, a lot of them must have been delivered after that date and I just think that that, based on a reading of that exhibit, is not a strong enough or reasonable enough inference to draw to support to summary judgment.

Again, it is a situation where the statement itself is so ambiguous, I mean, actually, that a literal reading of it would not support at all the plaintiffs' position. You have to read it very liberally to support the plaintiffs' position, that is, that they were talking about ten or 11 charts rather than ten or 11 vouchers in order to get to the inference which is sought to be drawn, which is that therefore they produced 14 or 15, whatever it was, charts later and, therefore, those later produced charts were ones that were produced as an agent of the state.

I appreciate the able arguments advanced by plaintiffs' counsel for their position.

They have certainly been vigorous in their attempt to overcome the motion for summary judgment, but without belaboring it any further, I believe, having reviewed all of the relevant materials, that the motion should be denied because there is insufficient evidence to allow reasonable inferences to be drawn that Dr. Winchell, on March the 10th and/or 12th, or either of those dates, 1980, was acting as the agent of the state or, even assuming that she was, that she would not have done the same thing in any event.

It is, of course, without real question in the case that she had sought the discovery before she ever saw the state and that she pursued her civil action before she ever met the state or saw the state; that she paid Mr. Simpson to appear in court after she met the state to obtain the discovery pursuant to the request filed before she met the state and it is also without dispute that the defendant in

the criminal case, that is, Dr. Hooper, the plaintiff in this case, moved to stay the civil action. He apparently felt that Dr. Winchell was pursuing it. He didn't apparently think that she had abandoned the civil action because he filed a motion to stay it. That certainly doesn't indicate to me that she had abandoned anything. And the fact that two years later she may have decided that she had enough, I think does not justify an inference that when she was pursuing her case she was doing it as an agent of the state.

So, for all of those reasons and other reasons which I could go on and on about, but which I don't intend to, I have already spent enough time on it, I do not believe there is enough to support the opposition to summary judgment and, therefore, the motion will be granted. Thank you very much.

Subject, of course, to getting that affidavit. When will you furnish that affidavit?

Ms. Gauvey: We will try to furnish it by Wednesday next week.

The court: Well, furnish plaintiffs' counsel with it and if they have something to say about it, I will expect to hear from them promptly.

(Thereupon, at 6:55 an adjournment was had inthis matter.)

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ORALOP.HOO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, et al.	:	
	:	
v.	:	CIVIL ACTION NO.
	:	M-82-2870
STEPHEN H. SACHS, et al.	:	

ORDER

On April 18, 1986, a hearing was held on pending motions for summary judgment in this case. The court having reviewed the subsequently filed affidavits, it is, for the reasons stated in open court, this 2nd day of May, 1986 by the United States District Court for the District of Maryland, ORDERED:

1) That the motion of defendant Cheryl Winchell for summary judgment is hereby GRANTED.

2) That the motion of the state defendants for summary judgment is hereby GRANTED.

3) That the defendants' motions to revise this court's Memorandum and Order of

September 16, 1985 are hereby DISMISSED as moot.

4) That the plaintiffs' request for permission to depose affiants Susan K. Gauvey and Debra Y. Gillaspie is hereby DENIED.

/s/
James R. Miller, Jr.
United States District
Judge

HOO2.ORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER and DEER PARK MEDICAL GROUP, P.A. a Maryland professional corporation	:	
vs.	:	CIVIL ACTION NO. M82-2870
STEPHEN H. SACHS and DALE P. KELBERMAN and HENRY AARON ROSE and ANDREW TARTAGLINO and CHERYL WINCHELL; STATE OF MARYLAND; JOHN STOPPLEMAN; JEFFREY ROSEN; STOPPLEMAN AND ROSEN	:	

...oOo...

In accordance with the Stipulation and Order dated March 18, 1986 (paper No. 184) and Order dated May 2, 1986 (paper No. 195) and filed in the above entitled case, it is

ORDERED and ADJUDGED:

1) That case be and is hereby "DISMISSED" with prejudice as to Defendants JOHN STOPPLEMAN, JEFFREY ROSEN, and STOPPLEMAN AND ROSEN.

That Motion of Defendant CHERYL WINCHELL for Summary Judgment is GRANTED.

That Motion of the STATE Defendants for Summary Judgment is GRANTED.

That Judgment be and is hereby entered in favor of DEFENDANTS CHERYL WINCHELL and STATE Defendants STEPHEN H. SACHS, DALE P. KELBERMAN, HENRY AARON ROSE and ANDREW TARTAGLINO and STATE OF MARYLAND.

Dated at Baltimore, Maryland this 14th day of May, 1986.

JOSEPH A. HAAS
Clerk
by

/s/
Deputy Clerk
Ron Lawson

JUD.HOO

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 86-1623

JAMES L. HOOPER; DEER PARK MEDICAL GROUP, P.A., a Maryland professional corporation

Plaintiff - Appellant

v.

STEPHEN H. SACHS; DALE P. KELBERMAN; HENRY AARON ROSE; ANDREW TARTAGLINO

Defendant - Appellee

and

STATE OF MARYLAND; JOHN STOPPLEMAN; CHERYL WINCHELL; JEFFREY ROSEN; STOPPLEMAN AND ROSEN

Defendant

APPEAL FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court

for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/
JOHN M. GREACEN
Clerk

JUD2.HOO

No. 87-514

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES L. HOOPER, ET AL.,

Petitioners,

v.

STEPHEN H. SACHS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the courts below correctly hold that insufficient evidence exists showing a violation of petitioners' Fourth Amendment rights?

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No. 87-514

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES L. HOOPER, et al.,

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v.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioners James L. Hooper and Deer Park Medical Group, P.A., filed this action pursuant to 42 U.S.C. §1983 seeking monetary relief from defendants (now respondents) Maryland Attorney General Stephen H. Sachs, Assistant Attorney General Dale P. Kelberman,

and Chief State medicaid fraud investigator Andrew J. Tartaglino, alleging that defendants violated petitioners' Fourth Amendment rights by using a private individual, Dr. Cheryl Winchell, to illegally search and seize petitioners' medical records. (App. at 2.)[1/]

The United States District Court for the District of Maryland granted defendants' motion for summary judgment, holding that after "having reviewed all of the relevant materials, . . . there is insufficient evidence to allow reasonable inferences to be drawn that Dr. Winchell . . . was acting as the agent of the State or, even assuming that she was, that she would not have done the same thing in any event." (App. at 119.)

The United States Court of Appeals for the Fourth Circuit, in an unpublished per

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1/ Citations in the form of "App. at __" are to the appendix to the petition for writ of certiorari.

curiam opinion, affirmed. The Fourth Circuit held that "[t]he record is devoid of any direct evidence that the MFCU personnel [defendants] encouraged Winchell to obtain information for them, and [petitioner] Hooper offered no more than speculation and conjecture to support that position." (App. at 6-7.) The petition to this Court followed.

REASONS FOR DENYING THE WRIT

The Petition Does Not Present A Single Substantial Federal Question

The courts below recognized this case for what it is: totally lacking in merit. Further review of this case is plainly unwarranted. The petition presents no novel or unsettled questions on which the lower federal courts require the guidance of this Court. The decisions below conform with prior recent decisions of this Court, and there is no reason existing for this Court to exercise its discretionary certiorari juris-

diction to review and then affirm this factually unique and legally unremarkable case.

Citing United States v. Jacobsen, 466 U.S. 109, 113 (1984), the Fourth Circuit agreed with the district court that "no genuine issue of material fact existed because [petitioner] Hooper had not presented sufficient evidence to establish that Winchell might have been a government agent, a necessary element for a Fourth Amendment violation." (App. at 5-6.) Indeed, the court of appeals noted that although the deposition testimony of Dr. Winchell and the affidavit testimony of Messers. Kelberman and Tartaglino indicated that Dr. Winchell was "neither directed nor encouraged" to obtain additional documents, Dr. Hooper offered only "speculation and conjecture" to the contrary. (App. at 6-7.) On these undisputed facts, the district court quite properly entered judgment in favor of defendants.

That decision is in complete accord with two recent decisions of this Court setting forth the controlling summary judgment principles. In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), which petitioners do not even cite in their petition, this Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

106 S.Ct. at 2552-53.

Further, this Court noted, the moving party does not bear a burden of producing evidence "showing the absence of a genuine issue of material facts, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged

by 'showing' - that is, pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case." 106 S.Ct. at 2554.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986), decided the same day as Celotex Corporation, this Court explained what the nonmoving party must show in order to successfully oppose a motion for summary judgment. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." 106 S.Ct. at 2510 (emphasis in original). This Court stated further that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly

probative, summary judgment may be granted." 106 S.Ct. at 2511 (citations omitted).

Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." 106 S.Ct. at 2512.

Defendants met fully their burden of showing there was no genuine issue of material fact. Petitioners' only response is that "summary judgment should not be awarded when an issue turns on credibility," Petition at 15. This Court in Anderson nevertheless held that even where "state of mind is at issue and the jury might disbelieve [the defendant] or his witnesses as to this issue," 106 S.Ct. at 2514, this does not relieve the nonmoving party of setting forth specific facts showing there is a genuine issue for trial:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had had a full opportunity to conduct discovery.

106 S.Ct. at 2514 (emphasis added). See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90 (1968).

Although petitioners have had their "full opportunity to conduct discovery," they presented no evidence in support of their claims. Thus, the district court concluded -- and properly so -- that their "position is on the line in which inference is piled upon vague or ambiguous inference, which . . . is insufficient to support an opposition to summary judgment." (App. at 114.) The Fourth Circuit agreed. Further review is plainly unwarranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents.

Date: October 23, 1987

No. 87-514

In the Supreme Court of the United States

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Supreme Court, U.S.
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AND ANDREW C. TARTAGLINO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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ARGUMENT

1. Respondents' Brief in Opposition contains a number of legally correct statements having no applicability to the case at bar. It demonstrates the existing confusion concerning the application of Rule

56. The isolated legalisms Respondents advance are precisely the problem with the court of appeals opinion -- considering evidence and elements of a cause of action in isolation from one another, rather than as an integrated whole.

2. Unquestionably, in opposing a motion for summary judgment a plaintiff must produce some evidence which would warrant a jury verdict in his favor. However, according to Respondents and the court of appeals, a plaintiff must produce direct evidence. Some evidence does not mean direct evidence. The burden can be sustained by producing circumstantial evidence, especially when, as here, that circumstantial evidence was buttressed by demonstrably false statements made by Respondents and Winchell in their

testimonies on other relevant matters.1/ Thus, Respondents' contentions that we argue simply that the jury might disbelieve their testimony, and that every case where state of mind is at issue must go to trial, is inaccurate and incorrect. Respondents merely attempt to obfuscate and confuse the issues.

3. By requiring "direct evidence" (A. 6) of MFCU encourgement of Winchell in her searches and seizures on March 10 and 12, 1980, the court of appeals, in essence, was mandating "smoking gun" evidence.2/ While this is not an employment discrimination

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1/ We note that our summaries of Respondents' and Winchell's testimonies have not been disputed. Nor is there any dispute that discovery from Respondents was delayed for more than three years and was finally had when the district court lifted the stay obtained by Respondents. When files that at all times were in the custody and control of Respondents finally were produced, documents relating to a period critical to this case were "missing" -- "lost" by Repondents.

2/ Implicit in the court of appeals statement that there was no direct evidence is that there was indirect or cirumstantial evidence.

case, "smoking gun" evidence is no less easy to acquire in a case of this type.3/ The standards applicable to what is required to defeat a defendant's motion for summary judgment necessarily are similar. Accordingly, what the Third Circuit said in Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, (en banc) (1987) (petition for certiorari dismissed pursuant to Rule 53 of the Rules of this Court, September 9, 1987, No. 86-2007), is apt. In the absence of a "smoking gun" (possibly contained in the "lost" documents), plaintiffs necessarily were required to rely on circumstantial evidence.

In the context of the summary judgment motion,

3/ Employment discrimination cases typically present fact questions where direct evidence is difficult or impossible to obtain; however, other cases contain fact issues with similar problems of proof. There is no reason to treat such an issue of proof differently when it arises in other than a discrimination context. It is the nature of the factual issue, not the type of case, which should be determinative.

> however, the court should have considered whether evidence of inconsistencies and implausibilities ... could support an inference [favorable to the plaintiff], not whether the evidence necessarily leads to that conclusion...
>
> The district court erred in weighing competing inferences and in resolving disputed facts.[4/]
> 11

Id. at 900 (emphasis in original).

Furthermore,

> we do not require direct proof of age discrimination because it is often unavailable or difficult to find. Dillon v. Coles, 746 F.2d at 1003. As the Supreme Court explained, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." Aikens, 460 U.S. at 716, 103 S. Ct. at 1482. *** In addition, "even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one." Id.

Id. at 899.

4/ As stated in our Petition at 15 and 30, the district court improperly weighed "competing inferences and resolv[ed] disputed facts." See, A. 114-117.

4. In the case at bar, relevant written records under defendants' control were "missing" -- "lost." The only material communications were between and among the defendants in this action, and defendants were told by the district court, prior to meaningful discovery, precisely how to testify to obtain a summary judgment.

5. Both Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), were decided by a divided Court. That notwithstanding, none of the opinions in either case supports a conclusion that summary for defendants was proper in this case.

Respondents quote the majority opinion in Celotex for the proposition that a plaintiff has the burden of producing some evidence on each element of his case (Br. at 5). They argue from the quoted language that plaintiffs were required to produce direct evidence that the MFCU encouraged Winchell's

March, 1980, searches and seizures. Respondents misinterpret Celotex to mean that the production of evidence requires direct evidence. Nothing in Celotex supports that position. Indeed, in Adickes v. S.H. Kress Co., 398 U.S. 144 (1970) (cited with approval by the Court in both Anderson and Celotex), the Court reversed a summary judgment for defendant on the ground that there was circumstantial evidence from which a jury might infer a conspiracy. 398 U.S. at 158-159; Anderson, supra, 106 S. Ct. at 2510-2511.

Similarly, Respondents quote Anderson (Br. at 8) for the proposition that discredited testimony normally is not a sufficient basis for drawing a contrary conclusion and that the plaintiff must present some affirmative evidence of facts he wishes to prove. Again, Respondents interpret some evidence to mean direct evidence. As stated above, in this case

there was circumstantial evidence,5/ buttressed by Respondents' demonstrably incredible testimonies on other material matters. Furthermore, the testimony of Anton Keeting (see, Pet. at 13-14) established that in some instances the MFCU asked private individuals to obtain evidence. He stated he was not sure whether such a request was made of Winchell.

6. The right of access to the courts is substantially unlimited. Rule 56 was not intended as a vehicle to foreclose litigants from their "day in court." The courts below, and Respondents, would achieve that result by imposing a virtually impossible burden in cases such as this by requiring direct evidence of facts peculiarly within defendants' knowledge and holding that circumstantial evidence, even when combined with demonstrably incredible testimony, is not enough to get to trial. The time for

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5/ See, p. 3 n. 2, supra.

this Court to clarify Anderson and Celotex is now, not after numerous civil plaintiffs have been denied the trial by jury to which they constitutionally are entitled.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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